No. 220138 ORG

Title: South Carolina, Plaintiff
v.
North Carolina

Docketed: June 8, 2007

Questions Presented

Date	Proceedings and Orders
Jun 7 2007	Documents filed with the Special Master are available at www.mto.com/sm/
Jun 8 2007	Motion for leave to file a bill of complaint filed. (Response due August 7, 2007)
Jun 8 2007	Application (06A1150) preliminary injunction, submitted to The Chief Justice.
Jun 12 2007	Response to Application requested by the Chief Justice due on or before August 7, 2007.
Aug 7 2007	Brief of respondent North Carolina in opposition filed.
Aug 7 2007	Response to application from respondent North Carolina filed.
Aug 22 2007	Application (06A1150) referred to the Court by The Chief Justice.
Aug 22 2007	DISTRIBUTED for Conference of September 24, 2007.
Aug 22 2007	Reply to response to application for preliminary injunction from South Carolina filed. (Distributed)
Aug 22 2007	Reply of petitioner South Carolina, Plaintiff filed. (Distributed)
Oct 1 2007	Motion for leave to file a bill of complaint GRANTED. Defendant is allowed thirty days within which to file an answer.
Oct 1 2007	Application (06A1150) denied by the Court
Oct 24 2007	Order extending time to file an answer to and including November 30, 2007.
Nov 30 2007	Motion for leave to intervene filed by Duke Energy Carolinas, LLC.
Nov 30 2007	Answer to Bill of Complaint filed by North Carolina
Nov 30 2007	Motion for leave to intervene filed by Catawba River Water Supply Project.
Dec 11 2007	Opposition to Duke Energy Carolinas, LLC's motion to intervene filed by South Carolina, Plaintiff. (Distributed)
Dec 12 2007	DISTRIBUTED for Conference of January 4, 2008.
Dec 13 2007	Opposition to The Catawba River Water Supply Project's motion to intervene filed by South Carolina, Plaintiff. (Distributed)
Dec 14 2007	Reply Brief in Support of the Motion of the Catawba River Water Supply Project for leave to intervene filed. (Distributed)
Dec 19 2007	Reply Brief in Support of the Motion of Duke Energy Carolinas, LLC for leave to intervene filed. (Distributed)
Jan 7 2008	Motion DISTRIBUTED for Conference of January 11, 2008.
Jan 15 2008	Kristin Linsley Myles, Esq., of San Francisco, California, is appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may be introduced and such as she may deem it necessary to call for. The Special Master is directed to submit Reports as she may deem appropriate. The compensation of the Special Master, the allowances to her, the compensation paid to her legal, technical, stenographic and clerical assistants, the cost of printing her Reports, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

Jan 15 2008	Motion for leave to intervene filed by Catawba River Water Supply Project is referred to the Special Master.
Jan 15 2008	Motion for leave to intervene filed by Duke Energy Carolinas, LLC is referred to the Special Master.
Feb 13 2008	Motion for leave to intervene filed by City of Charlotte, North Carolina.
Feb 25 2008	Response to City of Charlotte's motion for leave to intervene and file answer filed by respondent North Carolina.
Feb 25 2008	Opposition to City of Charlotte's motion for leave to intervene by South Carolina, Plaintiff filed.
Feb 27 2008	Motion DISTRIBUTED for Conference of March 14, 2008.
Mar 11 2008	Reply Brief in Support of the Motion of the City of Charlotte, North Carolina for leave to intervene filed. (Distributed)
Mar 17 2008	The motion of City of Charlotte, North Carolina for leave to intervene is referred to the Special Master.
Nov 28 2008	First Interim Report of the Special Master filed.
Dec 3 2008	DISTRIBUTED for Conference of January 9, 2009.
Dec 9 2008	Motion for leave to file exceptions to First Interim Report of the Special Master and Brief in Support of its Motion for Leave to File Exceptions filed by petitioner South Carolina, Plaintiff. (Distributed)
Dec 9 2008	Letter filed by Catawba River Water Supply Project. (Distributed)
Dec 18 2008	Intervenors' Response to the Motion of the State of South Carolina for Leave to File Exceptions to the First Interim Report of the Special Master. (Distributed)
Dec 19 2008	Response to South Carolina's Motion to File Exceptions to the Special Master's First Interim Report filed by respondent North Carolina. (Distributed)
Dec 22 2008	Reply of plaintiff South Carolina in Support of its Motion to File Exceptions to First Interim Report of the Special Master, filed. (Distributed)
Jan 9 2009	The Report of the Special Master is received and ordered filed. The motion for leave to file exceptions to First Interim Report of the Special Master is GRANTED. Parties and intervenors may file exceptions to the Report, with supporting briefs, on or before 2 p.m. Friday, February 13, 2009. Reply briefs, if any, are to be filed on or before 2 p.m. Monday, March 9, 2009. Sur-reply briefs, if any, are to be filed on or before 2 p.m. Monday, March 23, 2009.
Feb 13 2009	Exceptions of the State of South Carolina to First Interim Report of the Special Master filed.
Feb 13 2009	Letter filed by Duke Energy Carolinas, LLC.
Feb 13 2009	Letter filed by Catawba River Water Supply Project.
Feb 23 2009	Brief amicus curiae in support of Plaintiff's exceptions filed by the United States.
Mar 9 2009	Reply of respondent North Carolina in opposition to Plaintiff's exceptions filed.
Mar 9 2009	Reply of Catawba River Water Supply Project to Exceptions of South Carolina filed.
Mar 9 2009	Reply of the City of Charlotte, North Carolina in response to Exceptions of South Carolina filed.
Mar 9 2009	Reply of Duke Energy Carolinas, LLC to South Carolina's Exceptions filed.
Mar 10 2009	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 17 2009	Application (08A817) for leave to file sur-reply in support of exceptions to first interim

	report of the special master in excess of word limitation, submitted to The Chief Justice.
Mar 17 2009	Application (08A817) denied by The Chief Justice.
Mar 23 2009	DISTRIBUTED for Conference of March 27, 2009.
Mar 23 2009	Sur-Reply Brief of the State of South Carollina in support of Exceptions to First Interim Report of the Special Master filed. (Distributed)
Mar 23 2009	Motion for divided argument filed by defendant North Carolina and intervenors Duke energy Carolinas, LLC, Catawba River Water Supply Project and City of Charlotter, NC. (Distributed)
Mar 30 2009	The Exceptions to the Report of the Special Master are set for oral argument in due course.
Apr 20 2009	Motion for divided argument filed by defendant and intervenors DENIED and the time is divided as follows: 10 minutes to defendant, and 20 minutes to intervenors.
Apr 20 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jul 17 2009	CIRCULATED.
Sep 21 2009	All Record Materials are available on the Special Master's website at www.mto.com/sm/
Oct 6 2009	SET FOR ARGUMENT ON Tuesday, October 13, 2009.
Oct 13 2009	Argued. On Exceptions to the Report of the Special Master. For plaintiff: David C. Frederick, Washington, D.C.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For interveners: H. Christopher Bartolomucci, Washington, D.C. For defendant: Christopher G. Browning, Jr., Solicitor General, Raleigh, N.C.

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Party name: South Carolina, Plaintiff v. North Carolina

FILED
AUG
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 06-A 150

STATE OF SOUTH CAROLINA,
Applicant,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Motion for Leave To File Complaint

APPLICATION OF THE STATE OF SOUTH CAROLINA FOR A PRELIMINARY INJUNCTION

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Pursuant to 28 U.S.C. § 1251(a) and Rule 22 of the Rules of this Court, the State of South Carolina, by its Attorney General, Henry Dargan McMaster, respectfully requests the issuance of a preliminary injunction to preserve the status quo pending resolution of the related original action filed by the State of South Carolina contemporaneously with this application, by prohibiting North Carolina from authorizing transfers of water from the Catawba River in excess of those authorized as of the date of this application.

Background

As set forth in greater detail in its Complaint and its brief in support of its motion for leave to file that complaint, in 1991 North Carolina enacted an "interbasin transfer statute" pursuant to which it has authorized the transfer of at least 48 million gallons of water per day from the Catawba River Basin to basins of other rivers in North Carolina. The most recent such transfer was authorized in January 2007. In addition, there is at

least one pending application — by Union County — that seeks authority to transfer an additional 13 million gallons of water per day from the Catawba River.[1] The transfers that North Carolina has authorized to date already exceed its equitable share of the Catawba River and have directly harmed South Carolina and its citizens by severely reducing the flow of water into South Carolina that is available for the generation of hydroelectric power, economic development and commerce, and recreation.

The Catawba River is subject to "severe periodic fluctuations in water level," "inadequate water volume at ordinary stages,"[2] and severe droughts. *See* App. 14-21.[3] Indeed, both North Carolina and South Carolina have issued drought advisory warnings for the Catawba River Basin, with both States currently declaring that moderate drought conditions exist.[4] During the most recent prior drought, which lasted from 1998 through 2002, major boat landings and public access areas were closed due to the low water levels, harming both the public and the businesses that run the marinas. *See* App. 23, 38. Tap water was undrinkable in the City of Camden, South Carolina. *See* App. 38. Duke Energy was forced to reduce dramatically the generation of electricity from its hydroelectric

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[1] In 1989, the South Carolina Water Resources Commission had, pursuant to South Carolina Code Annotated §§ 49-21-10 *et seq.*, authorized both Lancaster County, South Carolina, and Union County, North Carolina — which jointly own a water treatment plant located in South Carolina on Lake Wylie, from which both counties derive their water supply — to transfer a maximum of 20 million gallons of water per day from the Catawba River. That permit, however, requires both counties to decrease or cease their withdrawal from the Catawba River, when necessary to maintain a sufficient flow of water downstream of Lake Wylie. *See* Class I Interbasin Transfer Permit, No. 29 WS01 S02 (May 8, 1989).

[2] *Jones v. Duke Power Co.*, 501 F. Supp. 713, 717 (W.D.N.C. 1980), *aff'd*, 672 F.2d 910 (4th Cir. 1981) (table).

[3] References to "App." are to the Appendix that is bound together with the motion for leave to file a complaint, the complaint, and the brief in support of that motion, which are being filed contemporaneously with this application.

[4] *See* North Carolina Drought Management Advisory Council, http://www.ncdrought.org (visited June 6, 2007); South Carolina State Climatology Office, http://www.dnr.sc.gov/climate/sco/Drought/drought_current_info.php.

stations located on the Catawba River. *See id.* And businesses, such as the Bowater pulp and paper mill, were forced to incur significant costs — more than $6,000 per day — because the water flow was no longer sufficient to assimilate treated wastewater in amounts allowed by state permits. *See* App. 32-33, 38-39. Indeed, the flow in major tributaries of the Catawba River was so reduced that the only water flowing was the discharge from wastewater treatment plants. *See* App. 39.

By authorizing the transfer of tens of millions of gallons of water on a daily basis from the Catawba River into other rivers, North Carolina's actions have exacerbated the already fragile state of the Catawba River and reduced further the often limited flow of water into South Carolina. Because efforts to reach a negotiated resolution of this dispute have been unsuccessful, South Carolina has filed a motion for leave to file a complaint seeking an equitable apportionment of the Catawba River and a permanent injunction preventing North Carolina from authorizing transfers in excess of its equitable share. To prevent further harm to South Carolina during the pendency of this action, South Carolina files this application for a preliminary injunction to prevent North Carolina from approving further transfers of water out of the Catawba River prior to this Court's equitable apportionment of the River.

Discussion

Courts traditionally consider four factors in determining whether to issue a preliminary injunction: "probability of success on the merits," "the risk of irreparable harm, the balance of the equities, and the public interest." *E.g., Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 670 (2003).

This Court has also granted a preliminary injunction in at least one original action. *See Pennsylvania v. West Virginia*, 39 S. Ct. 491 (1919) (mem.).[5] In that case, Pennsylvania and Ohio filed bills of complaint challenging a West Virginia statute that compelled all pipeline companies producing or transporting natural gas in West Virginia to satisfy the demand of West Virginians and permitted "surplus gas only to be carried into other states." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593-94 (1923). The statute would thus necessarily have resulted in "cutting down [the natural gas] carr[ied] into Pennsylvania and Ohio." *Id.* at 589. To prevent that reduction from occurring pending this Court's adjudication of the dispute, "[i]nterlocutory injunctions were prayed and granted at the outset and [we]re still in force" at the time the Court ruled, in that case, four years later. *Id.* at 590.

South Carolina seeks the same preliminary relief in this case, to prevent North Carolina from approving the transfer of more water from the Catawba River during the pendency of this dispute, thereby further reducing the volume of water flowing into South Carolina and inflicting additional harm on South Carolina, above and beyond the harm caused by North Carolina's past approval of such transfers. Indeed, each of the four factors is readily met in this case.

First, South Carolina has shown a probability of success on the merits. North Carolina's interbasin transfer regime is premised on the proposition that "a state rightfully may divert and use, as she may choose the waters flowing within her boundaries in [an] interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary," which this Court long ago rejected. *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922). Instead, "States have an affirmative duty under the doctrine of

[5] In *Texas v. Louisiana*, 414 U.S. 904 (1973) (mem.), this Court referred a motion for a preliminary injunction to the Special Master.

equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983). North Carolina's statute plainly violates that duty.

Moreover, because there are already times when the Catawba River does not have enough water to meet South Carolina's existing needs, *see* App. 14, there can be little doubt that North Carolina has already taken at least, if not more than, its entire equitable share of the Catawba River. *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945) (holding that equitable apportionment is warranted where, as here, "the claims to the water of a river exceed the supply"). Additional transfers of water from the Catawba River, beyond the 48 million gallons per day that North Carolina has already authorized, are highly likely to be found preempted as granting rights in excess of North Carolina's equitable share. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 108-10 (1938) (holding that a State "possesse[s] the right only to an equitable share of the water in" the river and cannot "award to [its citizens] any right greater than the equitable share").

Second, South Carolina has shown that further transfers would cause it irreparable injury. Additional transfers will necessarily further reduce the water flowing in the Catawba River into South Carolina and available for the generation of hydroelectric power, economic development and commerce, and recreation. The environmental and recreational harms alone that further transfers would cause constitute irreparable injury. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable."); *see also* App. 38, 39 (detailing the environmental and recreational harms incurred during the 1998-2002 drought). In addition, as this Court has recognized in analogous circumstances, "any diversion by [North

Carolina], unless offset by [South Carolina] at its own expense, will necessarily reduce the amount of water available to [South Carolina] users" in the Catawba River Basin. *Colorado v. New Mexico*, 459 U.S. 176, 188 n.13 (1982); *see also* App. 38-39 (detailing the monetary costs incurred by South Carolina residents and businesses during the 1998-2002 drought). South Carolina's citizens, however, will have no ability to recover those costs, rendering that economic harm irreparable as well.

Finally, the balance of equities tips decidedly in South Carolina's favor. Because North Carolina lacks authority to "award to [its citizens] any right greater than the equitable share," *Hinderlider*, 304 U.S. at 108, North Carolina and its citizens cannot be harmed by the prevention of future transfers, which would go well beyond North Carolina's equitable share. In addition, because the injunction would preserve the status quo, North Carolina and its citizens will be able to continue their current uses of the Catawba River, despite South Carolina's claims that North Carolina is already in excess of its equitable share. Moreover, North Carolina would remain free to reallocate current uses of the Catawba River to meet local needs, so long as it did not increase the total amount of water transferred from the Catawba River. The public interest likewise favors the preliminary injunction, because the harms imposed on South Carolina from further transfers far outweigh any harms to North Carolina from the injunction.

Conclusion

For the foregoing reasons, South Carolina respectfully requests the issuance of a preliminary injunction enjoining North Carolina from authorizing transfers of water from the Catawba River in excess of those authorized as of the date of this application, thereby preserving the status quo pending resolution of the related original action filed by the State of South Carolina contemporaneously with this application.

Respectfully submitted,



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Special Counsel to the
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June 7, 2007

IN THE
SUPREME COURT OF THE UNITED STATES

No. ___, Original & No. 06-A____

STATE OF SOUTH CAROLINA,
Plaintiff / Applicant,

v.

STATE OF NORTH CAROLINA,
Defendant / Respondent.

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to be served have been served. On June 7, 2007, I caused (1) three copies of the Motion of the State of South Carolina for Leave To File Complaint, Complaint, and Brief in Support of Its Motion for Leave To File Complaint (with Appendix), and (2) one copy of the Application of the State of South Carolina for a Preliminary Injunction to be served by overnight courier delivery on the following:

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David C. Frederick
Special Counsel to the
State of South Carolina

No. 138, Original

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IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To File Complaint

MOTION OF THE STATE OF SOUTH CAROLINA FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE COMPLAINT

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June 7, 2007

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MOTION FOR LEAVE TO FILE COMPLAINT

COMPLAINT

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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EXHIBITS

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IN THE

Supreme Court of the United States

No. ____, Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of South Carolina, by its Attorney General, Henry Dargan McMaster, and pursuant to Rule 17 of the Supreme Court's Rules, moves this Court for leave to file its Complaint against the State of North Carolina, for the reasons stated in the accompanying brief in support.

Respectfully submitted,

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June 7, 2007

IN THE

Supreme Court of the United States

No. ____, Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

COMPLAINT

The State of South Carolina, by its Attorney General, Henry Dargan McMaster, brings this suit against the State of North Carolina, and for its cause of action states as follows:

1. The Catawba River is an interstate river that originates in the mountains of North Carolina and flows through a series of lakes — including Lake Wylie, where it enters South Carolina — and unimpounded stretches for approximately 225 miles until it meets Big Wateree Creek to form the Wateree River in South Carolina.

2. The Catawba River is essential to the generation of hydroelectric power, economic development and commerce, and recreation in the area of South Carolina within the Catawba River Corridor and Basin. Yet the Catawba River is subject to severe periodic fluctuations in water level that can render its volume inadequate. The normal flow of the River has been significantly affected by severe droughts. Indeed, both North Carolina and South Carolina have issued drought advisory warnings for the Catawba River Basin, with both States currently declaring that moderate drought conditions exist. The most recent prior drought lasted from 1998 through 2002.

3. In 1991, North Carolina enacted an "interbasin transfer statute" that purports to authorize the transfer of large volumes of water from one river basin in North Carolina to another basin in that State. Under that statute, North Carolina has authorized the transfer of at least 48 million gallons per day from the Catawba River Basin, with the most recent such transfer authorized in January 2007.

4. These past transfers — and threatened pending transfers — exceed North Carolina's equitable share of the Catawba River. Because efforts at resolving this dispute through negotiation of an interstate compact have proved fruitless, South Carolina brings this Complaint for this Court to adjudicate the parties' dispute, to determine (with the assistance of a Special Master) the equitable apportionment of the Catawba River, and to enjoin North Carolina from authorizing past or future transfers inconsistent with that apportionment.

PARTIES

5. The State of South Carolina brings this suit in its capacity as sovereign and as *parens patriae* on behalf of its citizens.

6. The State of North Carolina has authorized interbasin transfers from the Catawba River through an act of its legislature and the actions of a state agency, the North Carolina Environmental Management Commission ("EMC"), which is equivalent to the State itself for purposes of this Court's jurisdiction.

JURISDICTION

7. The exclusive and original jurisdiction of this Court over controversies between two States is invoked under Article III, § 2, clause 2 of the Constitution of the United States and 28 U.S.C. § 1251(a). This Court has long recognized that it has "a serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States." *Arizona v. California*, 373 U.S. 546, 564 (1963).

THE CATAWBA RIVER BASIN

8. The Catawba River originates in the mountains of North Carolina. The mainstem of the River in North Carolina is almost entirely impounded by a series of seven hydropower reservoirs running from Lake James, located at the foot of the Blue Ridge Mountains, to Lake Wylie, which extends across the state boundary with the State of North Carolina near Charlotte, North Carolina.

9. The Catawba River enters the State of South Carolina through Lake Wylie. Allison Creek flows into the midlake region of Lake Wylie within South Carolina. The Catawba River flows out of Lake Wylie and is joined by Sugar Creek, Twelvemile Creek, and Cane Creek before draining into Fishing Creek Reservoir. The Catawba River flows out of Fishing Creek Reservoir and joins with Fishing Creek to flow into Great Falls Reservoir. The River then joins with Camp Creek and Rocky Creek to form Cedar Creek Reservoir. Cedar Creek flows into the Catawba River just below the Cedar Creek Reservoir dam. The Catawba River joins Big Wateree Creek to form the Wateree River, which flows through Lake Wateree. Grannies Quarter Creek and Sawneys Creek flow into the Wateree River downstream of Lake Wateree. Twentyfive Mile Creek and Big Pine Tree Creek enter the Wateree River near the City of Camden, followed by Swift Creek, Spears Creek, and Colonels Creek before merging with the Congaree River Basin to form the Santee River Basin.

10. The Catawba River Basin is the most densely populated river basin in the two States. That region includes the Charlotte-Gastonia-Rock Hill Metropolitan Statistical Area, which includes both North Carolina and South Carolina and is home to nearly 1.6 million people. The Catawba River Corridor in South Carolina includes York, Lancaster, and Chester Counties, contains nearly 300,000 people, and is expected to have significant growth over the next decade. The Catawba River Basin, which bisects the north-central portion of South Carolina, includes portions of eight South Carolina counties — most

of Chester, Kershaw, Lancaster, and York Counties, the eastern third of Fairfield County, and portions of Sumter, Lee, and Richland Counties.

11. The Catawba River serves a wide variety of North Carolina and South Carolina water-use purposes, including: aquaculture; golf course irrigation; hydroelectric water use; industrial water use; irrigation water use; mining process; thermoelectric water use; and water supplies.

12. As the North Carolina Division of Water Quality noted in 1995, the water quality of the Catawba River may be jeopardized by growth in the surrounding area. As of that year, 16 percent of the Catawba River Basin's nearly 3,100 miles of free-flowing rivers and streams were considered impaired due to pollution. In that 1995 report, the North Carolina Division identified eight major water-quality issues in the Basin, which include:

a) Nutrient inputs to lakes from both point and nonpoint sources;

b) Sedimentation in streams and lakes from urban runoff, construction, and agriculture;

c) Lack of assimilative capacity for oxygen-consuming wastes in streams and lake coves from wastewater treatment plant discharges;

d) Stream water quality impairment from urban stormwater runoff;

e) Health concerns associated with fecal coliform bacteria;

f) Toxicity from heavy metals and its impacts on aquatic life and water supplies;

g) Discharges of colored effluent from wastewater treatment plants; and

h) Enforcement of water-quality regulations and compliance with discharge permits.

13. Of particular relevance to the current dispute, the North Carolina Division recognized that solving these problems is beyond the capabilities of any one agency or

group and that cooperative efforts between the various stakeholders in the Catawba River Basin will be necessary to protect the Basin's water resources.

14. Such a multi-stakeholder negotiation process occurred recently, involving the Federal Energy Regulatory Commission, Duke Energy (which generates hydroelectric power from the Catawba River), and groups from South Carolina and North Carolina. Although more water may be necessary to sustain South Carolina's needs, it was agreed through those negotiations that the minimum continuous flow that South Carolina should receive from the Catawba River is 1,100 cubic feet per second — or about 711 million gallons per day. *See* App. 15, 36-37.

15. The Catawba River, however, is subject to severe periodic fluctuations in water level, and there are periods when the River does not have even minimally adequate flows. *See* App. 14-21. Indeed, a gauge that has long measured the daily flow of the Catawba River into South Carolina has found the average daily flow to be as low as 132 cubic feet per second — or only about 85 million gallons per day. *See* App. 16-17, 21. That gauge has recorded average minimum daily flows that range from roughly 400 to 700 cubic feet per second nearly every day of the year. *See id.* Indeed, there are only two calendar days on which the minimum daily average flow recorded over a 64-year period has always been above 1,100 cubic feet per second. *See id.*

16. In addition, as part of the multi-stakeholder negotiation process discussed in paragraph 14, Duke Energy developed a model to estimate the natural flow of the Catawba River, as if the lakes used to generate hydroelectric power were not there. *See* App. 15. Those data show that the Catawba River, even in its "natural" state, often would not deliver 1,100 cubic feet per second of water into South Carolina. *See* App. 15, 18, 36-37. From 1930 through 2002, that model estimates that the average daily flow would be below the 1,100 cubic feet per second on at least one day of the year — and as many as 104 days (in

2002) — in 61 of those 72 years, and in 17 of the last 20. *See* App. 15, 18.

17. The Catawba River has also been subjected to prolonged droughts in the mid-1950s, the late 1980s, and from 1998 through 2002; and it is currently experiencing moderate drought conditions today. *See* App. 15. During the drought that ended in late 2002, South Carolina and its citizens suffered numerous harms, including:

a) Major boat landings and public access areas were closed due to the low water levels, harming both the public and the businesses that run the marinas. *See* App. 23, 38.

b) Tap water was undrinkable in the City of Camden, South Carolina. *See* App. 38.

c) Duke Energy was forced to reduce dramatically the generation of electricity from its hydroelectric stations located on the Catawba River. *See id.*

d) Businesses, such as the Bowater pulp and paper mill, were forced to incur significant costs — more than $6,000 per day — because the water flow was no longer sufficient to assimilate treated wastewater in amounts allowed by state permits. *See* App. 32-33, 38-39.

e) The flow in major tributaries of the Catawba River was so reduced that the only water flowing was the discharge from wastewater treatment plants. *See* App. 39.

NORTH CAROLINA'S UNLAWFUL AUTHORIZATION OF TRANSFERS FROM THE CATAWBA RIVER

18. The harms to South Carolina from reduced flow in the Catawba River have been exacerbated by the "inter-basin transfer statute" that North Carolina enacted in 1991 and that applies by its express terms to the Catawba River. *See* N.C. Gen. Stat. Ann. § 143-215.22G(1)(h). Any "person" wishing to "transfer . . . 2,000,000 gallons of water or more per day" from a river basin must obtain a permit from the North Carolina EMC. *See id.* § 143-215.22I(a)(1)-(2). Transfers of less than 2 million gallons of water per day are implicitly authorized to occur without regulation by the EMC.

19. The North Carolina statute contains no provisions requiring a reduction in the amount of water transferred in the event of a drought or natural fluctuations in the flow of the Catawba River that limit the water available to downstream users in South Carolina. On the contrary, the statute allows the EMC to remedy "water supply problems" in North Carolina that are "caused by drought" by "grant[ing] approval for a temporary transfer." *Id.* § 143-215.22I(j).

20. The EMC has granted at least two permits under § 143-215.22I that have resulted in the transfer of tens of millions of gallons of water per day from the Catawba River:

a) In March 2002, the EMC granted the application by the Charlotte Mecklenburg Utilities to transfer up to 33 million gallons per day from the Catawba River Basin to the Rocky River Basin, more than double the 16 million gallons per day limit that had previously applied. This permit, moreover, was granted in the midst of the severe drought affecting the Catawba River from 1998 through 2002, and these inequitable withdrawals of water from the Catawba River necessarily exacerbated the harms that drought was imposing on South Carolina and its citizens.

b) In January 2007, the EMC granted the application by the Cities of Concord and Kannapolis to transfer up to 10 million gallons per day from the Catawba River Basin to the Rocky River Basin. The EMC granted that application over the objection of South Carolina, which noted, among other things, that the Cities' application and the EMC's environmental impact statement gave no consideration to the effects of the transfer on uses of the Catawba River in South Carolina. The EMC also approved the transfer despite the availability of alternative sources of water from other communities in North Carolina that stood ready, willing, and able to provide that water to the Cities of Concord and Kannapolis.

21. The statute also grandfathers the transfer by Union County of at least 5 million gallons per day from the Catawba River Basin. In addition, pending before the EMC is an application by Union County to increase by 13 million gallons per day its transfers of water from the Catawba River Basin to the Rocky River Basin.

22. South Carolina does not know the extent to which the North Carolina statute has implicitly permitted one or more transfers of less than 2 million gallons per day from the Catawba River.

23. South Carolina also does not know the extent to which entities within North Carolina have taken advantage of § 143-215.22I(b), which authorizes transfers without a permit from the EMC up to the full capacity of any facility that was existing or under construction on July 1, 1993.

24. The transfers of water out of the Catawba River that the EMC has approved and the North Carolina statute has permitted necessarily reduce the amount of water available to flow into South Carolina. Such transfers exacerbate the existing natural conditions and droughts that contribute to low flow conditions in South Carolina and cause the harms detailed above. Those transfers also

are in excess of North Carolina's equitable share of the Catawba River.

25. North Carolina's interbasin transfer statute "cannot be used" to resolve this dispute, *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981), because, in "interstate water disputes," "federal common law applies" and "our federal system does not permit the controversy to be resolved under state law," *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981).

NORTH CAROLINA'S REFUSAL TO AMELIORATE THE HARMS TO SOUTH CAROLINA

26. On October 31, 2006, South Carolina formally opposed the request of the Cities of Concord and Kannapolis for authority to transfer tens of millions of gallons of water per day from the Catawba River. That opposition expressly noted that the proposed transfer would both adversely affect the water quantity and quality in the South Carolina portion of the Catawba River and impair the affected South Carolina communities' ability to sustain future population growth, to attract new industry and maintain current businesses, to provide adequate drinking water, to protect the local wildlife, and to accommodate recreation. *See* App. 1-6.

27. On December 19, 2006, South Carolina Attorney General Henry McMaster wrote to North Carolina Attorney General Roy Cooper reiterating South Carolina's opposition to the proposed transfer. South Carolina also proposed to North Carolina that the EMC suspend its ongoing proceeding on the Cities' application while officials of North Carolina and South Carolina sought to negotiate an interstate compact addressing this issue, along with other water issues. Attorney General McMaster noted that, because growth in the Southeast would likely lead to such questions arising with increasing frequency, an interstate compact would be wiser and less costly to the taxpayers than litigating each question as it arises. *See* App. 7-8.

28. On January 3, 2007 — one week before the EMC's scheduled resolution of the Cities' application — North Carolina Attorney General Cooper responded. In that letter, Attorney General Cooper stated that he had forwarded the letter to Governor Mark Easley and the North Carolina Secretary for Human Resources, but made no mention of negotiating an interstate compact or delaying action on the Cities' application. *See* App. 9-10. The Cities' application was granted on January 10, 2007.

29. In granting the application, the EMC also failed to heed a resolution of the Catawba/Wateree River Basin Bi-State Advisory Commission ("Commission"), which includes elected state officials from both South Carolina and North Carolina. *See* App. 25. On January 8, 2007, the Commission had recommended that the EMC delay action on the Cities' application for at least six months to provide time for negotiation of an interstate compact to resolve the interstate dispute about the Cities' proposed transfer. *See* App. 26-27, 29-30.

PRAYER FOR RELIEF

WHEREFORE, the State of South Carolina prays:

1. That the Court enter a decree declaring that the North Carolina interbasin transfer statute cannot be used to determine each State's share of the Catawba River and equitably apportioning the Catawba River.

2. That the Court enter a decree enjoining North Carolina from authorizing transfers of water from the Catawba River, past or future, inconsistent with that apportionment, and also declaring that the North Carolina interbasin transfer statute is invalid to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment as determined by this Court's decree.

3. For such other and further relief as the Court may deem proper.

Respectfully submitted,

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June 7, 2007

No. ____, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To File Complaint

BRIEF OF THE STATE OF SOUTH CAROLINA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE COMPLAINT

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QUESTION PRESENTED FOR REVIEW

Whether North Carolina's interbasin transfer statute is invalid under the Supremacy Clause of the United States Constitution and the constitutionally based doctrine of equitable apportionment because North Carolina, pursuant to that statute, has authorized and continues to authorize transfers of water from the Catawba River in excess of its equitable share of the waters of that interstate river, thereby harming South Carolina and its citizens.

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INTRODUCTION

The Catawba River originates in the North Carolina mountains and winds 225 miles into South Carolina, crossing the border at Lake Wylie. Both States historically have relied on the Catawba River for hydroelectric power, economic development and commerce, and recreation in an area encompassing more than 1.5 million people and the Charlotte metropolitan area, which spans both States. Yet the flow of the Catawba River is unreliable and subject to scarcity in times of drought, most recently in 1998 through 2002, which created a crisis for South Carolinians dependent upon the River.

Despite the history of shared use and benefit of the Catawba River, in 1991 North Carolina enacted a statute by which persons could transfer up to 2 million gallons of water per day out of the Catawba River Basin and into basins of other rivers in North Carolina, without the prior authorization of that State's officials. In addition, pursuant to that statute, North Carolina has affirmatively authorized the transfer of at least 48 million gallons per day from the Catawba River Basin to basins of other rivers in North Carolina. The most recent such transfer was authorized in January 2007, and a pending application seeks authority to transfer an additional 13 million gallons per day from the Catawba River. These past and threatened future transfers exceed North Carolina's equitable share of the Catawba River and directly harm South Carolina and its citizens, severely reducing the flow of water available for the generation of hydroelectric power, economic development and commerce, and recreation.

South Carolina has attempted to resolve this dispute through negotiations and establishment of an interstate compact, but North Carolina has not been receptive to such efforts and, instead, has continued to authorize diversions from the Catawba River. South Carolina, therefore, has no means of preventing and undoing North Carolina's unlawful appropriation of the waters of the Catawba River other than invocation of this Court's original

jurisdiction. South Carolina, therefore, seeks leave to file a complaint, in which it seeks an equitable apportionment of the Catawba River and an order both enjoining North Carolina from authorizing transfers of water from the River inconsistent with that apportionment and preempting North Carolina's transfer statute to the extent it purports to authorize such transfers.

JURISDICTION

This case, involving a dispute between two sovereign States[1] over an interstate river, falls squarely within this Court's exclusive and original jurisdiction over controversies between two States under Article III, § 2, clause 2 of the United States Constitution and 28 U.S.C. § 1251(a). Indeed, this Court has long recognized that it has "a serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States." *Arizona v. California*, 373 U.S. 546, 564 (1963).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, clause 2 of the United States Constitution provides in relevant part:

> The judicial Power shall extend . . . to Controversies between two or more States[.]

Section 1251(a) of Title 28, United States Code, provides:

> The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

Sections 143-215.22G and 143-215.22I of the General Statutes of North Carolina are reproduced at App. 43-52.

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[1] An agency of the State is the State itself for purposes of original jurisdiction. *See Arkansas v. Texas*, 346 U.S. 368, 370-71 (1953).

STATEMENT OF THE CASE

A. The Catawba River

The Catawba River originates in the mountains of North Carolina and flows through a series of lakes — including Lake Wylie, where it enters South Carolina — and unimpounded stretches for approximately 225 miles until it meets Big Wateree Creek to form the Wateree River. *See* Compl. ¶ 1. The Catawba River has long been viewed as important to both South Carolina and North Carolina. In 1787, recognizing the possibilities for the River's development, the South Carolina legislature established a company to open the River "from the North Carolina line to the Camden Ferry, by means of canals, dams and locks." VII *The Statutes at Large of South Carolina* 549 (David J. McCord ed., 1840). North Carolina likewise established a "private company . . . to improve the Catawba for navigation." *Jones v. Duke Power Co.*, 501 F. Supp. 713, 718 (W.D.N.C. 1980), *aff'd*, 672 F.2d 910 (4th Cir. 1981) (table). These efforts ultimately proved unsuccessful, due in part to the "severe periodic fluctuations in water level" of the River and its "inadequate water volume at ordinary stages," which "rendered the river unfit for navigation in its natural state and an unworthy candidate for improvements to make it fit for navigation in the future." *Id.* at 717.

Despite these setbacks, it would soon be realized that the Catawba River's future in enhancing progress in the Carolinas lay not in making the River navigable in the nineteenth century, but in harnessing its potential for electrical power in the twentieth. Beginning in the 1890s — an era in which textile mills began to flourish throughout the South — a company, later known as Duke Power (now Duke Energy), was founded. That company came into being principally to provide power to the Piedmont's fledgling cotton mills. Today, Duke Energy owns and operates a system of 11 reservoirs — six in North Carolina, four in South Carolina, and one in Lake Wylie, on the border of the two States — in the Catawba-Wateree

Basin, which provides hydroelectric power to the region. *See* App. 14.

That region includes the Charlotte-Gastonia-Rock Hill Metropolitan Statistical Area, which includes both North and South Carolina and is home to nearly 1.6 million people.[2] The Catawba River Corridor in South Carolina includes York, Lancaster, and Chester Counties, contains nearly 300,000 people, and is expected to have significant growth over the next decade.[3] The Catawba River Basin, which bisects the north-central portion of South Carolina, includes portions of eight South Carolina counties — most of Chester, Kershaw, Lancaster, and York Counties, the eastern third of Fairfield County, and portions of Sumter, Lee, and Richland Counties.

The Catawba River is key to the economic development of these portions of South Carolina, a historically underdeveloped area, and currently supports a number of major industries, including Bowater, Inc., Tyco Electronics, Inc., Springs Global US, Inc., and Celanese Advanced Materials, Inc. Indeed, the Catawba River Basin is today the fastest growing sub-region in the Carolinas, and the River serves a wide variety of North Carolina and South Carolina water-use purposes, including aquaculture; golf course irrigation; hydroelectric water use; industrial water use; irrigation water use; mining process; thermoelectric water use; and water supplies. The River now provides drinking water for and receives waste discharges from 14 counties, 22 municipalities and two States — North Carolina and South Carolina.

The same "severe periodic fluctuations in water level" and "inadequate water volume at ordinary stages" that rendered the Catawba River unfit for navigation, *Duke Power*, 501 F. Supp. at 717, however, continue today. A

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[2] *See* http://www.census.gov/population/estimates/metro_general/2006/CBSA-EST2006-alldata.csv.

[3] *See* http://www.census.gov/popest/counties/files/CO-EST2006-ALLDATA.csv; Compl. ¶ 10.

streamflow gauge has been in operation from 1942 to the present below Lake Wylie, which straddles the North Carolina-South Carolina boundary and is where the Catawba River enters South Carolina. *See* App. 15-16. Measurements taken from that gauge show that the daily flow of the Catawba River into South Carolina has fluctuated widely and has been as low as 132 cubic feet per second (January 7, 2002).[4] *See* App. 16-17, 21; *see also* App. 20 (showing daily average flows for the entire year 2001, which ranged from nearly 7,000 cubic feet per second to less than 250 cubic feet per second). Further evidence comes from a model that Duke Energy developed during proceedings before the Federal Energy Regulatory Commission to estimate the natural flow of the Catawba River, as if the lakes used to generate hydroelectric power were not there. *See* App. 15. Those data show that the Catawba River, even in its "natural" state, often would not deliver the 1,100 cubic feet per second of water into South Carolina that a negotiated process involving Duke Energy and groups from South Carolina and North Carolina agreed was the minimum continuous flow that South Carolina should receive from the Catawba. *See* App. 15, 18; *see also* App. 36-37.

In addition, the Catawba River has been subjected to prolonged droughts in the mid-1950s, the late 1980s, and from 1998 through 2002. *See* App. 15. Both North Carolina and South Carolina have recently issued drought advisory warnings for the Catawba River Basin, with both States currently declaring that moderate drought conditions exist.[5] The effects of the drought that ended in 2002 were particularly severe on South Carolina. Major boat

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[4] One cubic foot per second is equivalent to about 646,000 gallons per day. Ten million gallons per day is equivalent to about 15.5 cubic feet per second.

[5] *See* North Carolina Drought Management Advisory Council, http://www.ncdrought.org (visited June 6, 2007); South Carolina State Climatology Office, http://www.dnr.sc.gov/climate/sco/Drought/drought_current_info.php.

landings and public access areas were closed due to the low water levels, harming both the public and the businesses that run the marinas. *See* App. 23, 38. Tap water was undrinkable in the City of Camden, South Carolina. *See* App. 38. Duke Energy was forced to reduce dramatically the generation of electricity from its hydroelectric stations located on the River. *See id.* And businesses, such as the Bowater pulp and paper mill, were forced to incur significant costs — more than $6,000 per day — because the water flow was no longer sufficient to assimilate treated wastewater in amounts allowed by state permits. *See* App. 32-33, 38-39. Indeed, the flow in major tributaries of the Catawba River was so reduced that the only water flowing was the discharge from wastewater treatment plants. *See* App. 39.

B. The North Carolina Interbasin Transfer Statute

In 1991, North Carolina enacted a statute governing transfers of water — that is, the "withdrawal, diversion, or pumping of surface water from one river basin and discharge of all or any part of the water in a[nother] river basin." N.C. Gen. Stat. Ann. § 143-215.22G(3). The statute applies to a large number of enumerated rivers, including the Catawba River. *See id.* § 143-215.22G(1)(h). Any "person" wishing to "transfer . . . 2,000,000 gallons of water or more per day" from a river basin must obtain a permit from the North Carolina Environmental Management Commission ("EMC"). *Id.* § 143-215.22I(a)(1)-(2). Transfers of less than 2 million gallons of water per day are implicitly authorized to occur without the EMC's prior approval. The statute also grandfathers both previously approved certificates for transfer and pre-existing water-transfer facilities, which may increase their transfers up to their full capacity without obtaining approval from the EMC. *See id.* § 143-215.22I(b), (i).

The North Carolina statute prescribes a number of factors that the EMC must consider in granting a permit, all of which on their face pertain only to North Carolina's interests. Thus, the EMC is directed to consider, among

other things, the "necessity, reasonableness, and beneficial effects" of the "proposed uses" of the transferred water and the possible "detrimental effects on" the "source river basin" and the "receiving river basin" in North Carolina. *Id.* § 143-215.22I(f). The North Carolina statute contains no provisions requiring a reduction in the amount of water transferred in the event of a drought that limits the water available to downstream users in South Carolina. On the contrary, the statute allows the EMC to remedy "water supply problems" in North Carolina that are "caused by drought" by "grant[ing] approval for a temporary transfer." *Id.* § 143-215.22I(j).

The EMC has granted at least two permits that have resulted in the transfer of tens of millions of gallons of water per day from the Catawba River. For example, in March 2002, the EMC granted the application by the Charlotte Mecklenburg Utilities to transfer up to 33 million gallons per day from the Catawba River Basin to the Rocky River Basin, more than double the 16 million gallons per day limit that had previously applied. *See* Compl. ¶ 20(a). In January 2007, the EMC granted the application by the Cities of Concord and Kannapolis to transfer up to 10 million gallons per day from the Catawba River Basin to the Rocky River Basin. *See id.* ¶ 20(b). The EMC granted this application over the objection of South Carolina, which noted, among other things, that the Cities' application and the EMC's environmental impact statement gave no consideration to the effects of the transfer on uses of the Catawba River in South Carolina. *See id.* Pending before the EMC is an application by Union County to increase by 13 million gallons per day its transfers of water from the Catawba River Basin to the Rocky River Basin. *See id.* ¶ 21.[6]

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[6] In 1989, the South Carolina Water Resources Commission had, pursuant to South Carolina Code Annotated §§ 49-21-10 *et seq.*, authorized both Lancaster County, South Carolina, and Union County, North Carolina — which jointly own a water treatment plant located in South Carolina on Lake Wylie, from which both counties derive their

Those transfers of water out of the Catawba River necessarily reduce the amount of water available to flow into South Carolina, exacerbate the existing natural conditions and droughts that contribute to low flow conditions in South Carolina, and cause the harms detailed above.

C. Events Leading To This Dispute

As noted above, South Carolina actively opposed the most recent application for a grant of authority to transfer water out of the Catawba River. In December 2006, Henry McMaster, the South Carolina Attorney General, wrote to his North Carolina counterpart, Roy Cooper, reiterating South Carolina's opposition to the Cities' application, as also expressed by Governor Mark Sanford and South Carolina's members of Congress. *See* App. 7. Attorney General McMaster noted that, while litigation in this Court was an option, South Carolina's preferred option was to have the officials of the two States negotiate an interstate compact, with the EMC staying its hand pending the outcome of those negotiations. *See* App. 7-8. On January 3, 2007 — one week before the EMC's scheduled resolution of the Cities' application — North Carolina Attorney General Cooper responded that he had forwarded the letter to Governor Mark Easley and the North Carolina Secretary for Human Resources. *See* App. 9-10. The response made no mention of any willingness to negotiate an interstate compact or to delay action on the Cities' application.

On January 8, 2007, the Catawba/Wateree River Basin Bi-State Advisory Commission ("Commission"), which includes elected state officials from both South Carolina and North Carolina, passed a resolution recommending that the EMC delay action on the Cities' application for at

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water supply — to transfer a maximum of 20 million gallons of water per day from the Catawba River. That permit, however, requires both counties to decrease or cease their withdrawal from the Catawba River, when necessary to maintain a sufficient flow of water downstream of Lake Wylie. *See* Class I Interbasin Transfer Permit, No. 29 WS01 S02 (May 8, 1989).

least six months. *See* App. 25, 26-27. That resolution noted South Carolina's opposition to the transfer and offered up the Commission as a possible mediator that could enable both States to reach a solution to this interstate dispute through adoption of an interstate compact. *See* App. 27, 29-30. The Commission, however, operates in a purely advisory capacity and has no regulatory authority or any other authority to bind North Carolina or South Carolina. *See* App. 26. The EMC ignored the Commission's advisory recommendation, as well as the opposition of South Carolina, and granted the Cities' application on January 10, 2007.

SUMMARY OF ARGUMENT

The North Carolina interbasin transfer statute, and the transfers from the Catawba River authorized under that statute, are directly contrary to this Court's decisions with respect to interstate rivers. Those decisions make clear that North Carolina, as the up-river State, has no right to claim control over the entire flow of the Catawba River, but instead is under a duty to ensure that South Carolina, the down-river State, enjoys the benefits of the Catawba River as well. Because North Carolina has transgressed the bounds of its limited rights under federal law, this Court should accept jurisdiction over South Carolina's Complaint. Following the full development of the record, the Court should enter a decree equitably apportioning the Catawba River, declaring North Carolina's interbasin statute invalid with respect to inequitable transfers out of the Catawba River, and prohibiting all transfers by North Carolina — past and future — that are inconsistent with that apportionment.

To assist in this task, the Court should appoint a Special Master, as has been its customary practice in equitable apportionment cases. A Special Master would be well positioned to compile the record that is characteristic of this type of case and to make recommended findings of fact and conclusions of law with respect to the numerous

factors that this Court considers in applying the doctrine of equitable apportionment.

ARGUMENT

I. FEDERAL COMMON LAW PRECLUDES RESORT TO THE NORTH CAROLINA INTERBASIN TRANSFER STATUTE FOR RESOLUTION OF THIS DISPUTE

Because this case "deal[s] with . . . water in [its] . . . interstate aspects, there is a federal common law" that governs this dispute, which is one "upon which state statutes or decisions are not conclusive." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103, 105 & n.7 (1972). Indeed, this "federal common law exists" precisely because "state law cannot be used" to resolve disputes between States about the use of an interstate river. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981); *see also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981) (recognizing that, in "interstate water disputes," "federal common law applies" and "our federal system does not permit the controversy to be resolved under state law"); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 108-10 (1938) (holding that "neither the statutes nor the decisions of either State can be conclusive" of the equitable apportionment under federal common law of an interstate river).

The North Carolina interbasin transfer statute "cannot be used" and is therefore irrelevant to the adjudication of this dispute. Instead, this case must be settled under federal common law, "on the basis of equality of right," recognizing the "equal level or plane on which all the States stand." *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931) (internal quotation marks omitted); *accord Kansas v. Colorado*, 206 U.S. 46, 97-100 (1907). As a result, the transfers from the Catawba River that North Carolina has previously approved cannot be presumed to be part of North Carolina's equitable share and North Carolina's statute should be declared invalid to the extent that it authorizes transfers in excess of North Carolina's

equitable apportionment as determined by federal common law. Under this Court's settled precedent, North Carolina has the burden of "present[ing] clear and convincing evidence in support of [those] diversion[s]." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).[7]

II. SOUTH CAROLINA IS ENTITLED TO AN EQUITABLE APPORTIONMENT OF THE CATAWBA RIVER, AND NORTH CAROLINA SHOULD BE ENJOINED FROM AUTHORIZING TRANSFERS FROM THE RIVER THAT ARE INCONSISTENT WITH THAT APPORTIONMENT

This Court has repeatedly held that "[f]ederal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other's interest in the river." *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003); *see also Kansas v. Colorado*, 206 U.S. at 95-98. At the "root of the doctrine is the same principle that animates many of the Court's Commerce Clause cases: a State may not preserve solely for its own inhabitants natural resources located within its borders." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983). Instead, "States have an affirmative duty under the doctrine of equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States." *Id.*

The North Carolina interbasin transfer statute, as drafted and applied by the North Carolina EMC, runs directly contrary to those principles. As shown above, the

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[7] *See Colorado v. New Mexico*, 467 U.S. at 317 (explaining that where, as here, the downstream State "has met its initial burden of showing 'real or substantial injury,'" the "burden shift[s]" to the upstream State "to show, by clear and convincing evidence, that reasonable conservation measures could compensate for some or all of the proposed diversion and that the injury, if any, to [the downstream State] would be outweighed by the benefits to [the upstream State] from the diversion") (quoting *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982)).

statute gives no meaningful consideration to South Carolina's uses and users of water that is transferred out of one interstate river basin and into another river basin within North Carolina. *See* N.C. Gen. Stat. Ann. § 143-215.22I(f). Moreover, the statute makes no provision for accommodating the competing needs of both States in the event of drought conditions or other water supply problems. On the contrary, the statute contemplates that the EMC will approve increased intrastate transfers to respond to such conditions, even though such transfers will necessarily reduce the water available to flow downstream to South Carolina. *See id.* § 143-215.22I(j). This Court has long rejected the principle, implicit in North Carolina's interbasin transfer regime, that "a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in [an] interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary." *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922).

Instead, this Court has repeatedly enforced the rule of equitable apportionment, which "is directed at ameliorating present harm and preventing future injuries to the complaining State." *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1028. The history of droughts and inconsistent flow that characterizes the Catawba River demonstrates that North Carolina's assertion of authority to transfer tens of millions of gallons of water daily out of the Catawba River — and the threat of further transfers in the future — imposes a serious and direct harm on South Carolina and its citizens. *See Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945) ("deprivation of water in . . . semiarid regions cannot help but be injurious," particularly where there is "inadequacy of the supply of water to meet all appropriative rights"). South Carolina has an important sovereign interest in preventing the harms caused by North Carolina's appropriations of water. *See, e.g.*, *Colorado v. New Mexico*, 459 U.S. at 182 n.9. South Carolina also possesses a significant *parens patriae* interest to

protect her citizens from those same harms. *See, e.g.*, *Nebraska v. Wyoming*, 325 U.S. at 616.

South Carolina, therefore, respectfully invokes this Court's jurisdiction to resolve its dispute with North Carolina by equitably apportioning the Catawba River.

III. THE COURT SHOULD APPOINT A SPECIAL MASTER

As the Court has commonly done in equitable apportionment cases, it should appoint a Special Master to take evidence and make a recommendation of the equitable apportionment of the Catawba River.[8] Equitable apportionment "calls for the exercise of an informed judgment on a consideration of many factors." *Nebraska v. Wyoming*, 325 U.S. at 618. In *Nebraska*, this Court provided "an illustrative not an exhaustive catalogue" of "relevant factors," which included:

> physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.

Id.; *see also Colorado v. New Mexico*, 459 U.S. at 186-87 (listing factors); *Colorado v. Kansas*, 320 U.S. 383, 385 (1943) (same); *Connecticut v. Massachusetts*, 282 U.S. at 670-71 (same). Unsurprisingly, in light of the multifaceted inquiry involved, cases in which this Court has equitably apportioned interstate rivers have involved submission of "voluminous evidence."[9]

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[8] *See, e.g.*, *Colorado v. New Mexico*, 467 U.S. at 313; *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1018; *Arizona v. California*, 460 U.S. 605, 609 (1983); *Nebraska v. Wyoming*, 325 U.S. at 591, 617.

[9] *E.g.*, *Nebraska v. Wyoming*, 507 U.S. 584, 593 (1993); *accord, e.g.*, *Colorado v. New Mexico*, 467 U.S. at 313; *Wyoming v. Colorado*, 259 U.S. at 471; *Kansas v. Colorado*, 206 U.S. at 105.

Indeed, this Court routinely "appoint[s] a Special Master to develop the record" when the record as presented in an original action "is not sufficiently developed to permit [the Court] to address the merits." *South Carolina v. Regan*, 465 U.S. 367, 382 (1984) (plurality); *see also United States v. Raddatz*, 447 U.S. 667, 683 n.11 (1980) (explaining that, "[i]n exercising our original jurisdiction under Art. III, we appoint special masters" who are "generally charged to take such evidence as may be . . . necessary" and "to find the facts specially and state separately his conclusions of law thereon") (internal quotation marks omitted; ellipsis in original). The appointment of a Special Master is particularly appropriate in this case to enable a full development of the record relevant to the equitable apportionment of the Catawba River, and to make recommended findings of fact and conclusions of law on the basis of the States' factual and legal submissions.

CONCLUSION

For the foregoing reasons, this Court should grant South Carolina's motion for leave to file a complaint and appoint a Special Master to make a recommendation to this Court of the equitable apportionment of the Catawba River between South Carolina and North Carolina.

Respectfully submitted,

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June 7, 2007

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EXHIBIT 1

[Seal Omitted]

HENRY MCMASTER
ATTORNEY GENERAL

October 31, 2006

Phil Fragapane
Division of Water Resources,
North Carolina Department of Environment
and Natural Resources
1611 Mail Service Center
Raleigh, NC 27699-1611

Re: Concord/Kannapolis Interbasin Transfer

Dear Mr. Fragapane:

On behalf of the citizens of South Carolina, we oppose the request from the communities of Concord and Kannapolis, NC, for the interbasin transfer ("IBT") of large amounts of water from the Catawba and Yadkin/Pee Dee Basins for use in the Rocky River Subbasin. This proposed transfer would adversely affect the water quantity and quality in both the SC portions of the Catawba River and the Pee Dee River. Ultimately, the IBT would impair the affected SC communities' ability to sustain future population growth, to attract new industry and maintain current businesses, to provide adequate drinking water, protect the local wildlife, and accommodate recreation.

Access to clean water is directly linked to the vitality of these South Carolina communities. There should be bi-state participation and cooperation regarding such fundamentally important decisions which affect both North and South Carolina water rights. Both states, together, should develop a basin wide water management plan in order to facilitate responsible and mutually beneficial water resource allocation. For NC's Environmental

Management Commission ("EMC") to unilaterally grant the proposed Concord/Kannapolis IBT without addressing the needs and rights of SC would be detrimental to future cooperation between the two states with respect to water resource management.

> "(f) In determining whether a certificate may be issued for the transfer, the Commission shall specifically consider each of the following items and state in writing its findings of fact with regard to each item:
>
> . . .
>
> (2) The present and reasonably foreseeable future detrimental effects on the source river basin, including present and future effects on public, industrial, and agricultural water supply needs, wastewater assimilation, water quality, fish and wildlife habitat, hydroelectric power generation, navigation, and recreation. Local water supply plans that affect the source major river basin shall be used to evaluate the projected future municipal water needs in the source major river basin."
>
> (2a) The cumulative effect on the source major river basin of any water transfer or consumptive water use that, at the time the Commission considers the application for a certificate is occurring, is authorized under this section, or is projected in any local water supply plan that has been submitted to the Department in accordance with G.S. 143-355(*l*).
>
> (3) The detrimental effects on the receiving river basin, including effects on water quality, wastewater assimilation, fish and wildlife habitat, navigation, recreation, and flooding . . ."

Importantly, the EIS does not even mention the effects (detrimental or otherwise) on the downstream communities, users or municipalities in South Carolina. The FEIS submitted to the EMC is required to consider, according to N.C.G.S.A. §143-215.22I(f)(2) "present and reasonably foreseeable future detrimental effects on the source river basin . . ." However, it fails to do so, completely omitting any mention of effects on the Catawba River Basin in SC. It also fails to say anything with respect to effects on riverways, instead focusing solely on effects to lakes. Further, the effects to lakes is based on the model used by Duke Power in their current FERC relicensing proposal which has not been finalized. Therefore, the parameters relied upon for the purposes of the FEIS may have changed by the time the Duke FERC relicense is approved.

In Section (f)(2a) of the statute, the EMC is required to consider the cumulative effect that this IBT would have on the river system. In order to address this, the FEIS would need to look at future IBTs within the Catawba and Yadkin/Pee Dee basins and to examine projected population growth along these systems both down and upstream, including population and industry growth in South Carolina.

Section (g) of the statute states:

> "(g) A certificate shall be granted for a water transfer if the applicant establishes and the Commission concludes by a preponderance of the evidence based upon the findings of fact made under subsection (f) of this section that: (i) the benefits of the proposed transfer outweigh the detriments of the proposed transfer, and (ii) the detriments have been or will be mitigated to a reasonable degree. The conditions necessary to ensure that the detriments are and continue to be mitigated to a reasonable degree shall be attached to the certificate in accordance with subsection (h) of this section."

This section thus requires that benefits of the proposed IBT outweigh the detriments of the proposed IBT and that the detriments of the IBT be mitigated. The EIS does not accurately establish that the benefits of the proposed IBT outweigh the detriments because it does not address adverse impacts to South Carolina Riparian owners, to community growth, to drinking water supply, or to local environments in South Carolina. Instead, the FEIS focuses upon effect on lake levels based on the previously mentioned, as yet approved, Duke FERC relicense modeling parameters. This analysis simply does not comply with the statute.

Further, the FEIS does not explore in the slightest mitigation in the Catawba Basin at all but only discusses mitigation efforts to be taken in the Rocky River Subbasin., i.e. the receiving basin.

Section (m) of the statute states:

> "(m) It is the public policy of the State to maintain, protect, and enhance water quality within North Carolina. Further, it is the public policy of the State that the cumulative impact of transfers from a source river basin shall not result in a violation of the antidegradation policy set out in 40 Code of Federal Regulations § 131.12 (1 July 1997 Edition) and the statewide antidegradation policy adopted pursuant thereto."

The portion of the Federal Clean Water Act mentioned in section (m) of the statute deals with degradation of waters, which the proposed IBT would violate. (40 CFR §131.12) This section states (in part):

> "(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

> (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
>
> (2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.
>
> (3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected."

The proposed IBT would significantly degrade the waters of SC in terms of water quantity, as well as water quantity, in violation of the Clean Water Act's antidegredation requirements. The FEIS does not discuss mitigation for such degradation to South Carolina waters as federal law requires.

B. Water rights in North and South Carolina are based in the common law principle of Riparian Rights. This

doctrine is rooted in the concept of reasonable use of water by landowners adjacent to the waterway. SC contends that the proposed IBT would interfere with the reasonable use of the water of its riparian owners within the Catawba basin while at the same time conferring a benefit on nonriparian owners in the Ricky River Subbasin.

C. Further, for the North Carolina Environmental Management Commission unilaterally to reach a decision which will ultimately affect commerce within South Carolina is in violation of the United States Constitution, article I, section 3 which delegates regulation of interstate commerce to the U.S. Congress. Clearly, the proposed IBT would effect SC's ability to maintain current infrastructure, attract new business, support growth in population and our economy, and encourage tourism.

Conclusion

The proposed IBT would surely have a detrimental effect upon the economy of SC, our ability to grow and attract new industry, upon the health and vitality of our wildlife, upon recreation and tourism and upon the health and public safety of the citizens of South Carolina. In our view, the proposed IBT contravenes federal statutes as well as the Federal Constitution. We urge rejection of the proposed IBT.

Very Truly Yours,

/s/ L. CHILDS CANTEY

L. Childs Cantey
Assistant Attorney General

On behalf of
Henry McMaster
Attorney General

EXHIBIT 2

[Seal Omitted]

HENRY MCMASTER
ATTORNEY GENERAL

December 19, 2006

The Honorable Roy Cooper
Attorney General, State of North Carolina
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

Re: Proposed Concord/Kannapolis Interbasin Water Transfer

Dear General Cooper:

As you know, on January 10, 2007 the North Carolina Environmental Management Commission is scheduled to render its decision concerning an interbasin water transfer proposed by the towns of Concord and Kannapolis. The State of South Carolina submitted comments to the Commission expressing in detail our concerns regarding the adverse impact this transfer would have upon South Carolina. Governor Sanford has expressed in writing his opposition to this interbasin transfer. Our members of Congress from the Catawba and PeeDee regions have likewise expressed their opposition. South Carolina does not believe the current process by which such a transfer is granted exclusively by North Carolina authorities treats South Carolina's interests and water users in accordance with governing legal principles.

This office has recently been approached by public officials and citizens throughout the Catawba and Wateree River area urging us to take whatever legal action is necessary to protect South Carolina's interests and rights. We are preparing to do so. One such option is litigation in the original jurisdiction of the United States Supreme

Court, a process which can take many years, as witnessed by the boundary dispute between Georgia and South Carolina which consumed more than ten years.

There is an alternative to litigation. The North Carolina Environmental Management Commission could suspend its ongoing IBT proceedings concerning the Concord-Kannapolis transfer while officials of North and South Carolina seek to negotiate an interstate compact addressing this issue, along with other water issues. Such a compact would have to be approved by the two states' legislatures and probably by the United States Congress as well. Our reaching an agreement concerning water disputes and related issues would be wiser and less costly to the taxpayers than litigating each question as it arises. As the Southeast grows, unprecedented water questions will likely arise with increasing frequency. A delay in planning could have serious consequences.

Even if the EMC were to turn down the request from Concord and Kannapolis, we will still need to address these issues as outlined above. If the EMC grants the request in virtually any form, South Carolina will have no choice but to take appropriate legal action to block its implementation.

I look forward to hearing from you and to continued discussions and cooperation.

Yours very truly,

/s/ HENRY MCMASTER

Henry McMaster

EXHIBIT 3

[Seal Omitted]

State of North Carolina

Department of Justice

Roy Cooper, Attorney General

January 3, 2007

The Hon. Henry McMaster, Attorney General
State of South Carolina
P.O. Box 11549
Columbia, S. C. 29211-1549

VIA: Fax and 1st Class Mail

Dear Henry:

Thank you for your letter of December 19, 2006 regarding water resource issues in the Catawba-Wateree River Basin.

The Catawba Basin is an important resource for both of our states. It's important as a clean water supply, a fish and wildlife habitat, a place for recreation, an economic development tool and a source of hydroelectric power. Your letter recognizes the pressures that continued growth in North and South Carolina may put on these resources. A framework for addressing these pressures will benefit both states.

Your letter, of course, raises issues of a legal nature and I thank you for informing me directly of your position. Your letter also raises complex policy issues and fundamental state policy questions regarding water issues. Therefore, I am forwarding your letter to Governor Mike Easley and Secretary of Environment and Natural Resources Bill Ross for their consideration.

Please keep me informed of your thoughts on these issues and your ideas for how they can be resolved.

With kind regards, I am

Very truly yours,

/s/ ROY

Roy Cooper

EXHIBIT 4

No. ____, Original

In The
Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

Affidavit of Dr. A. W. Badr

Personally appeared before me Dr. A. W. Badr, who being duly sworn, states under oath that:

1. I am Chief of Hydrology with the South Carolina Department of Natural Resources and have held this position since 1998.

2. I have earned the following academic degrees:

   a. Ph.D. in Biological and Agricultural Engineering awarded by North Carolina State University, Raleigh, North Carolina in 1983 with a major in Soil and Water Engineering and minors in Water Resources and Civil Engineering.

   b. M.Sc. in Biological and Agricultural Engineering awarded by North Carolina State University, Raleigh, North Carolina in 1978 with a major in Soil and Water Engineering and a minor in Mathematics.

   c. B.Sc. awarded by Alexandria University in Alexander, Egypt in 1968.

3. I provide professional and technical guidance and expertise in hydrology in all areas of concern to the South Carolina Department of Natural Resources, including issues that arise with regard to the Catawba River.

4. I am personally familiar with the Catawba River, various studies made of the Catawba River basin, and with various data that provide historic information about the Catawba River basin such as stream flow, precipitation, and use of the waters of the Catawba River.

5. Publications of mine include:

a. A. W. Badr, A. Wachob, J. A. Gellici (2004). South Carolina Water Plan, Second Edition. South Carolina Department of Natural Resources. 120 pages.

b. J.A. Gellici, A. W. Badr, M. Kiuchi, and S. L. Harwell (2004). Hydrologic Effects of the June 1998 – August 2002 Drought in South Carolina. South Carolina Department of Natural Resources, Report 34. 49 pages.

c. R.N. Cherry, A.W. Badr, A. Wachob (2001). General Hydrology of South Carolina. South Carolina Department of Natural Resources, Land, Water and Conservation Division. Hydrology/Geology Map 2.

d. Tabrizi, M. H., S. E. Said, A. W. Badr (1998). Nonlinear Modeling and Prediction of a River Flow System. Vol. 34 No. 6 Journal of American Water Resources Association, December 1998.

6. Attached hereto and incorporated herein is a report I have prepared at the request of the Attorney General for the State of South Carolina titled *Summary of Catawba-Wateree River Basin natural flows and the impact of water transfers from that basin in North Carolina* dated May 31, 2007, that accurately sets forth my opinion of the hydrologic conditions in the Catawba River basin.

/s/ A. W. BADR
Dr. A. W. Badr, Chief of Hydrology

Sworn to and Subscribed before me
this 31st day of May, 2007

/s/ SANDRA HEATH RUCKER [notary seal omitted]
Notary Public for South Carolina
My commission expires 4-29-09.

South Carolina Department of
Natural Resources

[Seal Omitted]

John E. Frampton
Director

May 31, 2007

Summary of Catawba-Wateree River basin natural flows and the impact of water transfers from that basin in North Carolina

There is usually more than enough water in the Catawba River to meet the needs of all of its water users in South Carolina, but even with responsible and cooperative reservoir management, there will be times when the Catawba River does not have enough water in it to meet South Carolina's needs. During most years, this condition may occur for only a few days if at all, but during drought years, this condition may occur for months at a time. Interbasin transfers of water out of the Catawba basin in North Carolina will reduce the amount of water in the river. Most of the time, there will be ample water in the system so that water transfers out of the basin will not be harmful to South Carolina, but there will be times when there is not enough water in the Catawba River to meet South Carolina's needs, and during those times, water transfers out of the basin in North Carolina will have a detrimental effect on the Catawba River in South Carolina.

Duke Energy owns and operates a system of eleven reservoirs in the Catawba-Wateree basin of North and South Carolina. Six lakes are located entirely in North Carolina, four lakes are located within South Carolina, and Lake Wylie is situated on the North Carolina-South Carolina border. Because the six lakes located entirely in North Carolina all drain into Lake Wylie, the outflow or discharge from Lake Wylie can serve as an indicator of how much water is flowing into South Carolina via the Catawba River.

As part of its recent FERC relicensing process, Duke Energy developed a water mass balance model to simulate conditions in its 11 lakes and the rivers that connect them within the Catawba-Wateree basin. Part of this model included developing natural water inflows for the basin for 75 years from 1929 through 2003, to simulate hydrologic conditions as if the lakes were not there. Results of the Duke Energy model were used to develop water allocation strategies for all users in the basin and to reach a formal agreement in the FERC license guaranteeing specific minimum continuous discharges from Lake Wylie into the Catawba River in South Carolina.

The minimum continuous flow requirement agreed to in the FERC license calls for the release of 1,100 cfs (cubic feet per second) from Lake Wylie into the Catawba River. The minimum continuous flow will be provided by a combination of leakage, spillage, and generation from the Lake Wylie dam.

Using data from the Duke Energy hydrologic model, the natural average daily flow of the Catawba River at the location of the Lake Wylie Dam was compared to the minimum continuous flow requirement (1,100 cfs) from Lake Wylie for the period 1930-2002. Table 1 shows the number of days per year in which the natural river flow at the Lake Wylie Dam would have been less than 1,100 cfs. For example, during the year 2002 — after years of drought — the natural inflow into Lake Wylie would have been less than 1,100 cfs for 104 days. When enough water is stored in the lakes, natural inflow can be supplemented to meet required flows. However, during periods of water shortage and consecutive dry years, low lake levels may make supplemental water unavailable. It is clear that during severe or prolonged droughts (such as in the mid-1950's, the late 1980's, and 1998-2002) there would be many days in which there will not be enough water in the basin to meet the required 1,100 cfs release from Lake Wylie.

The U.S. Geological Survey has operated a streamflow gaging station on the Catawba River just below Lake Wylie since 1942. This gage provides measured daily flows of the Catawba River, and because it is located 3.5 miles downstream of the Lake Wylie Dam, it provides a good measure of the releases from Lake Wylie, which has been in existence since 1904. Data from this gage indicate that daily average releases from Lake Wylie were less than 1,100 cfs for many days of each year (Table 2), and during drought years, that number usually exceeds 100 days.

The impact of a severe drought on the Catawba River can be seen in Figure 1, which shows the measured daily flow of the river just below Lake Wylie in the year 2001. Releases from Lake Wylie were less than 1,100 cfs on 205 days of that year, even though Table 1 indicates that the "natural" flow of the river at this location would have been less than 1,100 cfs for 70 days during that year. The actual flow of the river was much less than what it naturally would have been because some water was removed from the river for offstream uses, such as public supplies, and some water was lost to evaporation, but mainly because lake operators did not release as much water from their lakes as flowed into them. With lake levels already low and no idea of how much longer the drought would last, lake managers tried to retain as much water as possible for as long as possible, at the expense of downstream releases.

The Catawba River can experience very low flows at any time of the year, not just during the dry summer and fall months. Table 3, which lists the lowest measured daily average flow for each day of the year for the gage's 64-year period of record, shows that daily average flows of less than 1,100 cfs occurred on all but two days of the year. For example, the lowest flow of the Catawba River at this gage on any January 6 during the period of record was 562 cfs, and the lowest flow on any January 7 during the period of record was 132 cfs (which occurred on

January 7, 2002, and is also the lowest outflow ever recorded from Lake Wylie).

This information indicates that natural hydrologic conditions can cause insufficient flows in the Catawba River at any time of the year, and during severe droughts, the minimum flow requirement of 1,100 cfs may not be met for months at a time. Hydrologic conditions can result in periods when the basin does not have enough water to maintain the Catawba River at even minimally adequate flows, and during these times, transfers of even relatively small volumes of water out of the basin in North Carolina will further reduce the Catawba River flow, increasing the hardship for water users in South Carolina and prolonging the time that the river's flow will be less than 1,100 cfs.

According to the *South Carolina Water Plan – 2nd Edition*, trigger mechanisms should be established within a basin to reduce or restrict water transfers out of that basin when water availability becomes reduced to the point that there is not enough water to meet required streamflows or the water-use needs of all users within the donor basin. Applying this concept to the Catawba-Wateree basin, all water transfers out of the basin should be reduced as discharges from Lake Wylie approach 1,100 cfs, and all transfers should cease completely if discharges from Lake Wylie fall to 1,100 cfs or less.

The State *Water Plan* also promotes the concept of managing water allocation within an entire basin using a comprehensive plan that involves the entire basin, regardless of political boundaries. A commission or compact should be created to manage and allocate all the water in the Catawba-Wateree basin.

Table 1. Number of days per year during which the natural average daily flow of the Catawba River at the location of the Lake Wylie Dam would have been less than 1,100 cfs, based on data from the Duke Energy CHEOPS hydrologic model

Year	Number of days during which flow is less than 1,100 cfs	Year	Number of days during which flow is less than 1,100 cfs	Year	Number of days during which flow is less than 1,100 cfs
1930	9	1955	27	1980	4
1931	22	1956	37	1981	32
1932	4	1957	5	1982	13
1933	1	1958	4	1983	4
1934	2	1959	1	1984	3
1935	0	1960	4	1985	10
1936	4	1961	5	1986	43
1937	1	1962	9	1987	18
1938	8	1963	10	1988	44
1939	12	1964	4	1989	6
1940	20	1965	3	1990	0
1941	23	1966	4	1991	10
1942	2	1967	3	1992	0
1943	17	1968	8	1993	10
1944	14	1969	0	1994	1
1945	14	1970	2	1995	0
1946	7	1971	0	1996	1
1947	10	1972	4	1997	13
1948	5	1973	0	1998	11
1949	1	1974	0	1999	47
1950	7	1975	0	2000	62
1951	24	1976	0	2001	70
1952	6	1977	4	2002	104
1953	20	1978	1		
1954	29	1979	0		

Table 2. Number of days per year in which the measured daily average flow of the Catawba River below the Lake Wylie Dam (USGS gage 02146000) was less than 1,100 cfs, for the years 1942 through 2004

Year	Number of days in which flow was less than 1,100 cfs	Year	Number of days in which flow was less than 1,100 cfs	Year	Number of days in which flow was less than 1,100 cfs
1942	27	1963	68	1984	41
1943	31	1964	63	1985	108
1944	3	1965	62	1986	154
1945	21	1966	80	1987	93
1946	29	1967	123	1988	200
1947	15	1968	78	1989	50
1948	23	1969	49	1990	35
1949	4	1970	108	1991	59
1950	13	1971	50	1992	45
1951	61	1972	37	1993	76
1952	30	1973	35	1994	28
1953	78	1974	31	1995	10
1954	135	1975	15	1996	27
1955	115	1976	71	1997	48
1956	117	1977	66	1998	82
1957	53	1978	44	1999	109
1958	56	1979	16	2000	164
1959	47	1980	62	2001	205
1960	38	1981	137	2002	228
1961	35	1982	82	2003	10
1962	90	1983	54	2004	13

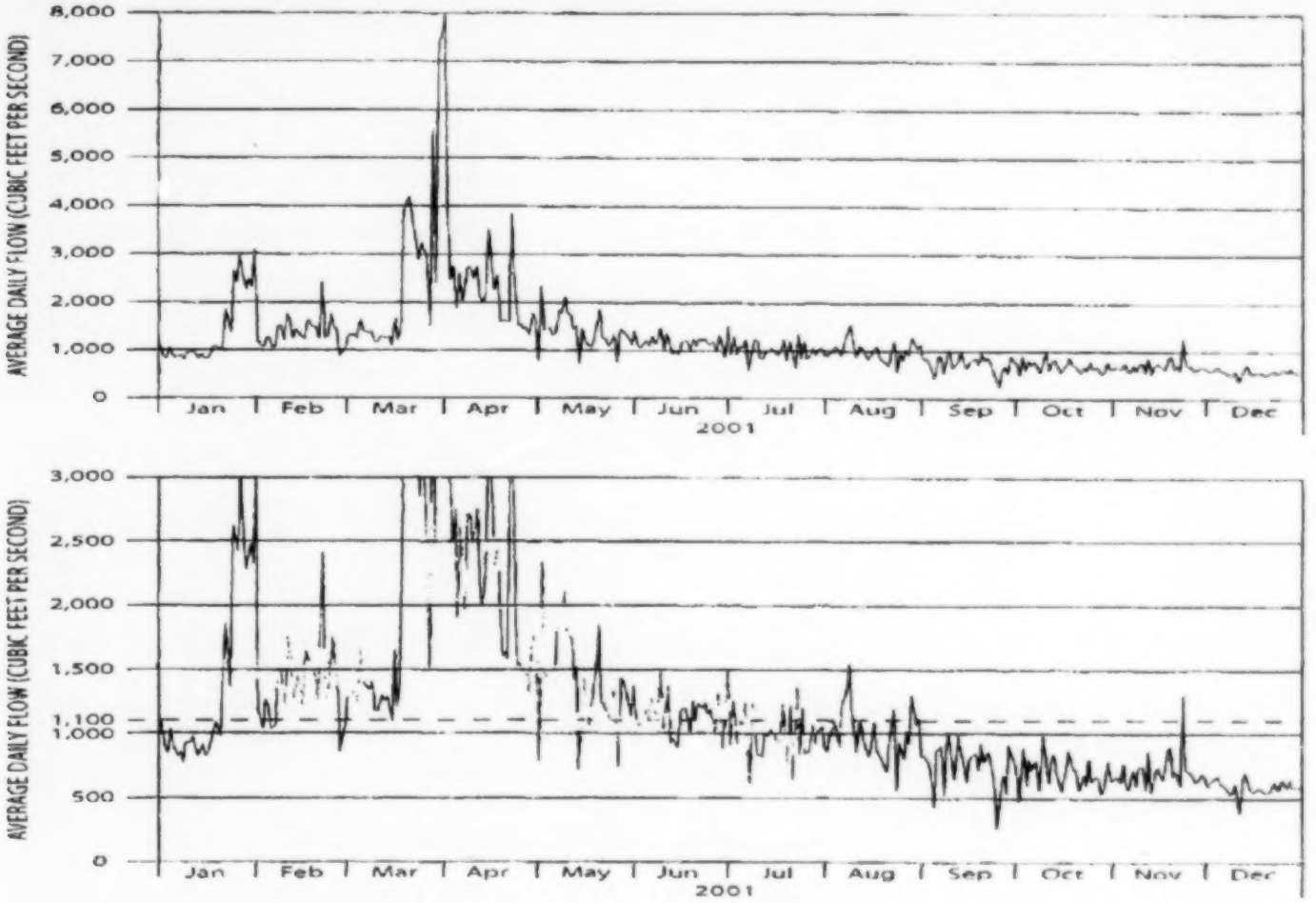


Figure 1. Measured average daily flow of the Catawba River in the year 2001, measured at USGS gage 02146000, located 3.5 miles downstream from the Lake Wylie Dam. The lower graph highlights flows less than 1,100 cubic feet per second.

Table 3. Minimum of daily average flows measured for each day of the year for the Catawba River below the Lake Wylie Dam (USGS gage 02146000), for the years 1942 through 2006

Day of month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1	567	606	396	701	638	558	529	648	568	548	552	591
2	554	713	689	672	605	558	572	577	596	475	565	622
3	602	780	633	616	631	566	524	603	567	576	593	649
4	579	756	720	341	572	600	514	565	535	512	602	619
5	597	696	720	286	615	566	576	627	431	598	560	612
6	562	732	641	664	649	576	503	625	562	581	382	600
7	132	609	727	601	602	699	538	660	528	625	409	564
8	646	505	418	592	593	485	612	590	521	560	594	528
9	653	717	620	628	577	626	583	549	581	533	611	545
10	672	661	645	701	610	616	554	587	525	601	615	608
11	546	690	599	676	632	579	535	642	586	572	565	388
12	607	721	688	614	672	606	578	654	525	416	569	627
13	588	742	683	610	624	590	563	561	593	468	541	606
14	616	714	544	618	684	558	589	583	483	266	616	580
15	517	668	478	562	616	620	586	576	625	558	688	537
16	591	758	596	652	663	520	616	535	555	473	565	555
17	549	780	831	618	574	485	518	535	570	368	640	577
18	590	758	1,110	701	684	485	553	642	542	543	622	562
19	587	782	697	579	656	569	730	659	487	513	666	544
20	288	638	732	621	589	533	575	527	528	540	585	537
21	326	590	696	622	660	545	509	564	603	490	592	554
22	594	744	795	664	594	670	616	506	608	538	528	620
23	519	755	623	619	578	539	602	605	496	557	573	564
24	330	714	585	578	574	607	616	309	615	582	676	571
25	587	676	708	350	641	682	608	541	263	545	587	638
26	604	734	645	227	543	578	603	592	595	568	585	550
27	565	652	519	755	573	609	588	636	501	546	591	628
28	647	422	515	667	596	505	616	579	530	527	593	574
29	638	1,110	471	632	588	516	648	588	584	575	593	581
30	759		489	607	582	549	616	468	457	550	654	582
31	657		628		525		605	479		412		555

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EXHIBIT 5

No. ____, Original

In The
Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

Affidavit of Mr. Laron A. Bunch, Jr., Manager of Lake Wylie Marina

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Personally appeared before me Mr. Laron A. Bunch, Jr., who being duly sworn, states under oath that:

1. I am the manager of the Lake Wylie Marina.

2. Lake Wylie Marina has operated continuously as a family owned business since 1975.

3. I was the Manager of the Lake Wylie Marina during the drought of 2002 (the "Drought") and am familiar with the impacts of the Drought on the operations and finances of the Lake Wylie Marina.

4. The Lake Wylie Marina is located on Highway 49 S. at Buster Boyd Bridge, Lake Wylie, in York County, South Carolina.

5. The Lake Wylie Marina is a seven-acre, full service marina located on the shores of Lake Wylie.

6. In addition to operating as a marine retail operation, Lake Wylie Marina has 82 wet slips, approximately 400 dry storage slips, and a marine repair business.

7. The Lake Wylie marina is located adjacent to the Buster Boyd Access Area, a facility on Lake Wylie containing four public use boat ramps for the purpose of allowing the public to launch boats into Lake Wylie.

8. Many people that use the Buster Boyd Access Area utilize the facilities of Lake Wylie Marina to purchase food, fuel, and other services.

9. The dry storage operation consists of large buildings where boats are stacked in racks. To launch these boats at a customer's request, forklifts are used to lift the boats from the storage racks. The forklifts then carry the boats to lakeside facilities (the "Forklift Facilities") where the forklifts lower the boats into the water.

10. Lake Wylie is a reservoir located in the Catawba River basin and water flows in the Catawba River are critical to the lake levels of Lake Wylie during periods of low precipitation.

11. During the summer of 2002, the water levels of Lake Wylie dropped precipitously as the result of drought conditions. As the result of the drops in lake levels (the following are referred to jointly as the "Impacts"):

a. Duke Energy closed the ramps in the Buster Boyd Access Area for several months because low water levels destroyed the ability of people to launch safely their boats into Lake Wylie. Closing the ramps had a direct financial impact on Lake Wylie Marina by reducing the flow of customers from the Buster Boyd Access Area to the Lake Wylie Marina.

b. Approximately two thirds of the wet slips at Lake Wylie Marina could not be used for approximately three months.

c. Boats stored in the dry storage facilities could not be launched because lake levels were too low for the Forklift Facilities to be used for approximately one month.

d. Lake Wylie Marina lost customers for its wet slips and its dry storage facilities because the wet slips

EXHIBIT 6

No. ____, Original

In The
Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

Affidavit of Senator Robert Wesley Hayes, Jr.

Personally appeared before me Senator Robert Wesley Hayes, Jr., who being duly sworn, states under oath that:

1. I am presently serving in the South Carolina Senate and have been a member of the South Carolina Senate since September 17, 1991.

2. I am a member of the Catawba/Wateree River Basin Bi-State Advisory Commission (the "Commission") established by S.C. Code Ann. Section 44-59-10 and have been a member since the Commission's first meeting on October 21, 2005, serving as the Commission's first Chairman.

3. The Commission consists of fifteen members who reside in counties which abut the Catawba/Wateree River Basin and includes (1) two members of the North Carolina House of Representatives, (2) two members of the North Carolina Senate, (3) two members of the South Carolina House of Representatives, and (4) two members of the South Carolina Senate. Other members of the Commis-

could not be used and the boats stored in the dry storage facilities could not be launched.

12. The Impacts caused material, financial harm to Lake Wylie Marina and adversely impacted the customers of Lake Wylie Marina.

13. Water transfers out of the Catawba River basin that increase the frequency of low water conditions have a material, adverse financial impact on the Lake Wylie Marina.

/s/ LARON A. BUNCH, JR.
Laron A. Bunch, Jr., Manager, Lake Wylie Marina

Sworn to and Subscribed before me
this 30 day of May, 2007

/s/ MELISSA WALLACE [notary seal omitted]
Notary Public for South Carolina
My commission expires 4/26/14.

sion represent various interest groups as set forth in S.C. Code Ann. Section 44-59-50.

4. As set forth in S.C. Code Ann. Section 44-59-20, the purposes of the Commission include (1) providing guidance and making recommendations to local, state, and federal legislative and administrative bodies, and to others as it considers necessary and appropriate, for the use, stewardship, and enhancement of the water, and other natural resources, for all citizens within the river basins [the Catawba Basin in this instance], and (2) providing a forum for discussion of issues affecting the basin's water quantity and water quality, and issues affecting other natural resources.

5. The Commission serves in an advisory capacity only. As set forth in S.C. Code Ann. Section 44-59-20:

> (C) All of the authority granted to the River Basins Advisory Commissions shall be advisory in nature and in no way shall the commissions be construed to have any regulatory authority.
>
> (D) The commissions shall have no authority to obligate or otherwise bind the State of North Carolina, the State of South Carolina, or any agency or subdivision of either state.

6. The Commission passed a resolution and sent a memorandum to the North Carolina Environmental Management Commission dated January 8, 2007, with regard to the Concord/Kannapolis Interbasin Transfer Request that stated in part:

> Whereas, the Commission has received testimony from a variety of residents and governments along the Catawba river Basin in both States [South Carolina and North Carolina] stating concerns regarding the impact of the transfer of water from this Basin [Catawba] to another river basin [Yadkin/Pee Dee] upon their quality of life; and

Whereas, prior public hearings have failed to eliminate opposition to this proposal, and minimize the anxieties and concerns; and,

Whereas, multiple government entities along the Catawba River Basins, including the South Carolina Attorney General, stated at this last meeting their commitment to litigate with the first action being to seek injunctions to stop any withdrawal until the matter is settled judicially.

Whereas, all parties present felt the duly legislated Catawba/Wateree River Basin Bi-State Advisory Commission represented a knowledgeable body that could mediate a result to this dispute without litigation; and,

Whereas, all parties present with a desire to sue agreed to withdraw their commitment to sue if the EMC would delay action for six months and allow the Catawba/Wateree River Basin Bi-State Advisory Commission the opportunity to attempt to assess this situation and mediate a solution;

Be it therefore resolved, that this body recommends that the North Carolina Environmental Advisory Commission delay further action on this matter at least six months. Be it further resolved that the EMC agrees to participate in dialogues and negotiations with the Catawba/Wateree River Basin Bi-State Commission and corresponding state agencies with the common purpose of solving this conflict, and seeking formal procedures and compacts whereby Interstate resolutions to future issues of similar nature be addressed with all participants contributing to the decision-making process.

7. The Memorandum was submitted by North Carolina Senator, the Honorable Dan Clodfelter, Chairman.

8. A true copy of the memorandum is attached hereto.

9. In spite of the best efforts by the parties from both the States of North Carolina and South Carolina working through the Commission, the EMC issued the interbasin transfer certificate to the cities of Concord and Kannapolis.

/s/ ROBERT HAYES, JR.

Senator Robert Wesley Hayes, Jr.

Sworn to and Subscribed before me
this 30 day of May, 2007
/s/ ANN M. JOHN [notary seal omitted]
Notary Public for South Carolina
My commission expires March 5, 2008.

CATAWBA/WATEREE RIVER BASIN BI-STATE ADVISORY COMMISSION

MEMORANDUM

TO: North Carolina Environmental Management Commission

FROM: Sen. Dan Clodfelter, Chairman
Catawba/Wateree River Basin Bi-State Advisory Commission

DATE: January 8, 2007

SUBJECT: Resolution to delay Concord/Kannapolis Interbasin Transfer Request

Be informed that on January 5, 2007, at its duly constituted meeting, the Catawba/Wateree River Basin Bi-State Advisory Commission unanimously approved the following resolution.

Whereas, the Commission has received testimony from a variety of residents and governments along the Catawba River Basin in both States stating concerns regarding the impact of the transfer of water from this Basin to another River Basin upon their quality of life; and

Whereas, prior public hearings have failed to eliminate opposition to this proposal, and minimize anxieties and concerns; and,

Whereas, multiple government entities along the Catawba River Basins, including the South Carolina Attorney General, stated at this last meeting their commitment to litigate with the first action being to seek injunctions to stop any withdrawal until the matter is settled judicially.

Whereas, all parties present felt the duly legislated Catawba/Wateree River Basin Bi-State Advisory Commission represented a knowledgeable body that could mediate a resolution to this dispute without litigation; and,

Whereas, all parties present with a desire to sue agreed to withdraw their commitment to sue if the EMC would delay action for six months and allow the Catawba/Wateree River Basin Bi-State Advisory Commission the opportunity to attempt to assess this situation and mediate a solution;

Be it therefore resolved, that this body recommends that the North Carolina Environmental Advisory Commission delay further action on this matter at least six months. Be it further resolved that the EMC agrees to participate in dialogues and negotiations with the Catawba/Wateree River Basin Bi-State Commission and corresponding state agencies with the common purpose of solving this conflict, and seeking formal procedures and compacts whereby Interstate resolutions to future issues of similar nature be addressed with all participants contributing to the decision-making process.

Respectfully submitted,

Dan Clodfelter, Chairman

ATTACHMENTS

EXHIBIT 7

No. ____, Original

In The
Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

Affidavit of Mr. Dale Herendeen

Personally appeared before me Mr. Dale Herendeen, who being duly sworn, states under oath that:

1. I am employed by Bowater Incorporated ("Bowater").

2. I am the Environmental Manager of Bowater's Catawba Operation (the "Catawba Plant"), located on the Catawba River, Town of Catawba, York County, South Carolina.

3. I have worked at the Catawba Plant as Environmental Manager since May 2001.

4. I am familiar with the impacts of the drought of 2002 on the Catawba Plant.

5. The Catawba Plant:

   a. Was established in 1957.

   b. Is one of the largest coated paper and market pulp mills in the world and is the largest in North America.

c. Has an annual capacity of 649,000 metric tons of coated paper and 245,000 metric tons of market pulp.

6. The South Carolina Chamber of Commerce named Bowater's Catawba Operations South Carolina's 2004 Manufacturer of the Year. In 2005, Industry Week Magazine in association with the National Association of Manufacturers (NAM) named Bowater's Catawba Operations a "Best Plants" award winner.

7. The Catawba Operation employs approximately 1,000 employees.

8. From 2003 through 2005, the Catawba Operation has received capital improvements that included the construction of a $175 million state-of-the-art kraft-pulping mill, along with a $106 million paper machine conversion.

9. The Catawba Plant is dependent on water as a resource that is temporarily removed from the Catawba River and used in plant operations that is then returned to the Catawba River in treated form.

10. When operating at full capacity, the Catawba Plant uses approximately 30 million gallons per day of water from the Catawba River that is returned to the Catawba River after appropriate treatment.

11. For the Catawba Plant to operate efficiently, the Catawba River (a) must be high enough to cover the plant intakes located on the Catawba River and (b) flowing at a rate adequate to receive the water discharges from the Catawba Plant within the limits of the Catawba River's assimilative capacity at the discharge point.

12. During one of the worst droughts on record, from 1998 to 2002, the Catawba River was severely depleted and the lack of water threatened the operations of the Catawba Plant.

13. The reduced flows in the Catawba River from 1998 – 2002 reduced the assimilative capacity of the Catawba River at the Catawba Plant such that the Catawba Plant was forced to severely limit its discharge into the

Catawba River because there was not enough flow to assimilate treated wastewater at the limits prescribed by its state permit. As a result, the Catawba Plant had to utilize on-site holding ponds for wastewater and incur extra wastewater treatment costs in excess of $6000/day to maintain production. By late 2002, the Catawba Plant was close to reaching holding pond capacity. If holding pond capacity had been reached, the Catawba Plant would have had to potentially curtail production which would have likely caused significant financial loss to Bowater and forced layoffs due to the cessation of plant operations.

14. Transfers of water out of the Catawba River basin in the State of North Carolina mean less water is available in the Catawba River to meet the requirements of the Catawba Plant operations.

/s/ DALE HERENDEEN
Dale Herendeen, Environmental Manager

Sworn to and Subscribed before me
this 30 day of May, 2007

/s/ Donna Uebler [notary seal omitted]
Notary Public for South Carolina
My commission expires February 3, 2010.

EXHIBIT 8

No. ____, Original

In The
Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

Affidavit of Ms. Donna Lisenby, Catawba Riverkeeper

Personally appeared before me Ms. Donna Lisenby, who being duly sworn, states under oath that:

1. I am the Catawba Riverkeeper and the Executive Director of the Catawba Riverkeeper Foundation, Inc. (the "Foundation").

2. The Foundation is a 501(c)(3) non-profit environmental organization.

3. I have been the Catawba Riverkeeper since 1998.

4. I received a Bachelors of Science from Clemson University in 1987.

5. The mission of the Foundation is to advocate for and secure protection and enhancement of the Catawba River, its lakes, tributaries and watershed so that it will always sustain the human and wildlife populations that depend on it for life.

6. I am personally familiar with the Catawba River from its origins in the State of North Carolina until its terminus in the State of South Carolina.

7. The statements and opinions set forth in this affidavit are based on my experiences working as the Catawba Riverkeeper, including participation in rulemaking and legislative processes, patrolling the river, studying and commenting on permits and developments proposed within the basin, reading studies, documents and other materials, and involvement in a variety of other matters that have an effect on the Catawba River and its environs, and the aquatic life it supports.

8. Part of my job as the Catawba Riverkeeper is to patrol the entire reach of the Catawba River, including the various reservoirs created by dams in the Catawba River, in the States of North Carolina and South Carolina, both by boat and by vehicle.

9. The Catawba River basin, in the States of North Carolina and South Carolina:

a. Contains 13 hydro stations

b. Contains 11 reservoirs

c. Spans over 362 km of river

d. Has a total drainage area of approximately 2888 km of reservoir and island shoreline

e. Flows through nine counties in North Carolina and five counties in South Carolina

f. Has a total drainage area of 12,302.5 square kms

g. Provides a drinking water supply for over 1.3 million people whose needs are projected to increase over 200% in the next 50 years

h. Provides the energy to power 116,000 homes and the water to support over 8100MW of fossil and nuclear-fueled power plants

10. There is an intricate set of dependencies on the Catawba/Wateree River system, all hinging upon the delicate balance of water use both now and in the future. Jobs, communities, industry, recreation, and the environment are at stake.

11. The water flows of the Catawba River vary widely from season to season and year to year. For example, the United States Geological Survey has reported the following data for the Catawba River at their stream gauge located on the Catawba River Near Rock Hill, SC:

The numbers are the average minimum, maximum, and mean stream flow in cubic feet per second for the date given calculated for the period Oct. 1, 1895, through Sept. 30, 2006, as reported by the United States Geological Survey.

	Minimum	Maximum	Mean[1]
March 31	628	19,100	6,550
June 30	549	9,540	3,240
September 30	457	14,200	3,240
December 31	555	93,000	5,820

12. As Catawba Riverkeeper, I meet with stakeholders, interested parties, and representatives of state agencies about issues of concern about the Catawba River.

13. As Catawba Riverkeeper, I have participated on behalf of the Foundation as a stakeholder in the ongoing negotiations (the "FERC Negotiations") between Duke Power Company LLC, doing business as Duke Energy Carolinas, LLC ("Duke") and other stakeholders related to the renewal of various Federal Energy Regulatory Commission ("FERC") licenses for various reservoirs located on the Catawba River that are held by Duke.

14. The FERC Negotiations resulted in certain agreements with regard to the FERC Licenses that are set forth in that certain Comprehensive Relicensing Agreement for the Catawba-Wateree Hydro Project FERC Project No. 2232 effective as of August 1, 2006 (the "Relicensing Agreement").

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[1] http://waterdata.usgs.gov/nwis

15. I am familiar with the terms of the Relicensing Agreement.

16. The Relicensing Agreement has been filed with the FERC.

17. As Catawba Riverkeeper and through participation in the FERC Negotiations, I am familiar with the protocols related to river flows, particularly the low in flow protocols (the "LI Protocols") and how the LI Protocols are implemented and the effect that removing water from the Catawba River has on the frequency of implementation of the LI Protocols, particularly in times of drought.

18. The Catawba River begins in the mountains of North Carolina near Mount Mitchell and on its 225 mile course to South Carolina is dammed 11 times creating the following reservoirs: Lake James, Lake Rhodhiss, Lake Hickory, Lake Lookout Shoals, Lake Norman, Mountain Island Lake, Lake Wylie, Fishing Creek Lake, Great Falls Lake, Rocky Creek Lake and Lake Wateree.

19. As Catawba Riverkeeper, I am familiar with various issues impacting the Catawba River, including, but not limited to (a) water quality, (b) water quantity, (c) historic streamflow patterns and their impacts on the users of the Catawba River, (d) historic reservoir levels and their impact on the users of the Catawba River and its associated lakes, (e) development both within and along the shores of the Catawba River, (f) industrial development along the Catawba River, (g) current populations and predicted growth along the Catawba River corridor, (h) the flora and fauna found in and appurtenant to the Catawba River, (i) current and predicted demand for the waters of the Catawba River, (j) the issues with regard to the impacts and potential impacts of interbasin transfers of the waters of the Catawba River to other river basins, and (k) the impact of the LI Protocols, particularly in time of drought.

20. The Catawba River basin has one of the fastest growing populations in the States of North and South Carolina. The largest city in North and South Carolina is

Charlotte, NC. It is located in the Catawba River Basin. The greater Charlotte region added approximately 300,000 residents from 2000 to 2006 or the equivalent of twice the population of Asheville, North Carolina.

21. The consequences of interbasin transfers of water out of the Catawba River basin by the upstream State of North Carolina reach through the agency of natural laws into the territory of the State of South Carolina because the flow of the Catawba River is reduced. The natural consequences of such interbasin transfers impact the State of South Carolina by lowering the quantity of water in the Catawba River that flows into the State of South Carolina.

22. During one of the worst droughts on record, from 1998 to 2002, the Catawba River was severely depleted and struggled to meet water demands at the 2002 population levels. During the last year of the drought, the following impacts were recorded (the "Drought Factors"):

a. Algae blooms occurred on Lake Wateree in the State of South Carolina that caused such taste and odor problems in finished drinking water for the City of Camden, South Carolina that residents stopped drinking tap water and started buying bottled water.

b. Most boat landings and public access areas on the Catawba River lakes, in both the States of North Carolina and South Carolina, closed due to low water levels, greatly impacting public recreation and access to these public trust waters.

c. Duke dramatically reduced electricity generation at their thirteen hydroelectric power generation stations located on the Catawba River.

d. The Bowater pulp and paper mill in the State of South Carolina was forced to severely limit its discharge into the Catawba River because there was not enough flow to assimilate treated wastewater at the limits prescribed by its state permit. As a result, Bowater had to construct temporary

holding ponds for wastewater, and the plant was within days of reaching holding pond capacity which would have necessitated shut down of one of the State of South Carolina's largest employers.

e. Major tributaries of the Catawba River basin, including Fishing Creek which flows through York and Chester counties in the State of South Carolina, were so reduced in flow that the only waters flowing were waters from wastewater treatment discharges.

23. The diversion of the waters of the Catawba River in the State of North Carolina into other river basins results, through the agency of natural law, in decreasing the flows into the State of South Carolina and exacerbates the Drought Factors whenever there are drought conditions in the Catawba River basin.

24. The Relicensing Agreement contains certain protocols for the reservoir system operated by Duke known as the "Low In Flow Protocols" (the "LI Protocols"). As set forth in Appendix C of the Relicensing Agreement with regard to the LI Protocols:

Low Inflow Protocol (LIP) for the Catawba-Wateree Project

PURPOSE

The purpose of this Low Inflow Protocol (LIP) is to establish procedures for reductions in water use during periods of low inflow to the Catawba-Wateree Project (the Project). The LIP was developed on the basis that all parties with interests in water quantity will share the responsibility to establish priorities and to conserve the limited water supply.

OVERVIEW

This Low Inflow Protocol provides trigger points and procedures for how the Catawba-Wateree Pro-

ject will be operated by the Licensee [Duke], as well as water withdrawal reduction measures and goals for other water users during periods of low inflow (i.e., periods when there is not enough water flowing into the Project reservoirs to meet the normal water demands while maintaining Remaining Usable Storage [defined in the Relicensing Agreement] in the reservoir system at or above a seasonal target level). The Licensee will provide flow from hydro generation and other means to support electric customer needs and the instream flow needs of the Project. During periods of normal inflow, reservoir levels will be maintained within prescribed Normal Operating Ranges [defined in the Relicensing Agreement]. During times that inflow is not adequate to meet all of the normal demands for water and maintain reservoir levels as normally targeted the Licensee will progressively reduce hydro generation. If hydrologic conditions worsen until trigger points outlined herein are reached, the Licensee will declare a Stage 0 - Low Inflow Watch and begin meeting with the applicable agencies and water users to discuss this LIP. If hydrologic conditions continue to worsen, the Licensee will declare various stages of a Low Inflow Condition (LIC) as defined in the Procedure section of this document. Each progressive stage of the LIC will call for greater reductions in hydro station releases and water withdrawals, and allow additional use of the available water storage inventory. The goal of this staged LIP is to take the actions needed in the Catawba-Wateree River Basin to delay the point at which the Project's usable water storage inventory is fully depleted. While there are no human actions that can guarantee that the Catawba-Wateree River Basin will never experience operability limitations at water intake structures due to low reservoir levels or low streamflows, this LIP is intended to provide additional

time to allow precipitation to restore streamflow, reservoir levels, and groundwater levels to normal ranges. The amount of additional time that is gained during the LIP depends primarily on the diagnostic accuracy of the trigger points, the amount of regulatory flexibility the Licensee has to operate the Project, and the effectiveness of the Licensee and other water users in working together to implement their required actions and achieve significant water use reductions in a timely manner.

25. All interbasin transfers authorized by the State of North Carolina, including the recent transfer granted to the North Carolina cities of Concord and Kannapolis that transfer water out of the Catawba River into the Yadkin/Pee Dee River Basin, impact and injure the State of South Carolina by:

a. Affecting both the quality and quantity of water by permanently removing water from the portion of the Catawba River located in the State of North Carolina upstream of the border with the State of South Carolina, making less water available to the State of South Carolina for drinking, recreation, economic development, and waste assimilation.

b. Causing an increase in the amount of treated waste water discharged into the Yadkin/Pee Dee Rivers, thereby removing waste assimilation capacity from the South Carolina portion of the Pee Dee River which impacts South Carolina local governments and industries currently dependent on the Pee Dee River for drinking water, recreation, economic development and waste assimilation.

c. Exacerbating the Drought Factors during any periods of drought conditions in the Catawba River basin.

d. Increasing the frequency that LI Protocols under the FERC Licenses will be implemented to the detriment of all stakeholders, including the State of South Carolina, its citizens, its municipalities, and the flora and fauna of the Catawba River.

e. Increasing the frequency that the Catawba River Project's usable water storage inventory will be depleted.

26. Based on materials I have read and conditions I have observed, and the statements made above, it is my opinion that the Catawba River has reached its threshold for sustainable use.

/s/ DONNA LISENBY
Donna Lisenby, Catawba Riverkeeper

Sworn to and Subscribed before me
this 30th day of May, 2007

/s/ SUSAN ADKINS [notary seal omitted]
Notary Public for South Carolina
My commission expires 2/27/16.

STATUTORY PROVISIONS INVOLVED

North Carolina General Statutes Annotated § 143-215.22G provides:

§ 143-215.22G. Definitions.

In addition to the definitions set forth in G.S. 143-212 and G.S. 143-213, the following definitions apply to this Part.

(1) "River basin" means any of the following river basins designated on the map entitled "Major River Basins and Sub-basins in North Carolina" and filed in the Office of the Secretary of State on 16 April 1991. The term "river basin" includes any portion of the river basin that extends into another state. Any area outside North Carolina that is not included in one of the river basins listed in this subdivision comprises a separate river basin.

a.	1-1	Broad River.
b.	2-1	Haw River.
c.	2-2	Deep River.
d.	2-3	Cape Fear River.
e.	2-4	South River.
f.	2-5	Northeast Cape Fear River.
g.	2-6	New River.
h.	3-1	Catawba River.
i.	3-2	South Fork Catawba River.
j.	4-1	Chowan River.
k.	4-2	Meherrin River.
l.	5-1	Nolichucky River.
m.	5-2	French Broad River.
n.	5-3	Pigeon River.
o.	6-1	Hiwassee River.

p.	7-1	Little Tennessee River.
q.	7-2	Tuskasegee (Tuckasegee) River.
r.	8-1	Savannah River.
s.	9-1	Lumber River.
t.	9-2	Big Shoe Heel Creek.
u.	9-3	Waccamaw River.
v.	9-4	Shallotte River.
w.	10-1	Neuse River.
x.	10-2	Contentnea Creek.
y.	10-3	Trent River.
z.	11-1	New River.
aa.	12-1	Albemarle Sound.
bb.	13-1	Ocoee River.
cc.	14-1	Roanoke River.
dd.	15-1	Tar River.
ee.	15-2	Fishing Creek.
ff.	15-3	Pamlico River and Sound.
gg.	16-1	Watauga River.
hh.	17-1	White Oak River.
ii.	18-1	Yadkin (Yadkin-Pee Dee) River.
jj.	18-2	South Yadkin River.
kk.	18-3	Uwharrie River.
ll.	18-4	Rocky River.

(2) "Surface water" means any of the waters of the State located on the land surface that are not derived by pumping from groundwater.

(3) "Transfer" means the withdrawal, diversion, or pumping of surface water from one river basin and discharge of all or any part of the water in a river basin different from the origin. However, notwithstanding the basin definitions in G.S.

143-215.22G(1), the following are not transfers under this Part:

a. The discharge of water upstream from the point where it is withdrawn.

b. The discharge of water downstream from the point where it is withdrawn. (1991, c. 712, s. 1; 1993, c. 348, s. 1; 1997-443, s. 15.48(b).)

North Carolina General Statutes Annotated § 143-215.22I provides:

§ 143-215.22I. Regulation of surface water transfers.

(a) No person, without first securing a certificate from the Commission, may:

(1) Initiate a transfer of 2,000,000 gallons of water or more per day from one river basin to another.

(2) Increase the amount of an existing transfer of water from one river basin to another by twenty-five percent (25%) or more above the average daily amount transferred during the year ending July 1, 1993, if the total transfer including the increase is 2,000,000 gallons or more per day.

(3) Increase an existing transfer of water from one river basin to another above the amount approved by the Commission in a certificate issued under G.S. 162A-7 prior to July 1, 1993.

(b) Notwithstanding the provisions of subsection (a) of this section, a certificate shall not be required to transfer water from one river basin to another up to the full capacity of a facility to transfer water from one basin to another if the facility was existing or under construction on July 1, 1993.

(c) An applicant for a certificate shall petition the Commission for the certificate. The petition shall be in writing and shall include the following:

(1) A description of the facilities to be used to transfer the water, including the location and capacity of water intakes, pumps, pipelines, and other facilities.

(2) A description of the proposed uses of the water to be transferred.

(3) The water conservation measures to be used by the applicant to assure efficient use of the water and avoidance of waste.

(4) Any other information deemed necessary by the Commission for review of the proposed water transfer.

(d) Upon receipt of the petition, the Commission shall hold a public hearing on the proposed transfer after giving at least 30 days' written notice of the hearing as follows:

(1) By publishing notice in the North Carolina Register.

(2) By publishing notice in a newspaper of general circulation in the area of the river basin downstream from the point of withdrawal.

(3) By giving notice by first-class mail to each of the following:

a. A person who has registered under this Part a water withdrawal or transfer from the same river basin where the water for the proposed transfer would be withdrawn.

b. A person who secured a certificate under this Part for a water transfer from the same river basin where the water for the proposed transfer would be withdrawn.

c. A person holding a National Pollutant Discharge Elimination System (NPDES) wastewater discharge permit exceeding 100,000 gallons per day for a discharge located downstream from the proposed withdrawal point of the proposed transfer.

d. The board of county commissioners of each county that is located entirely or partially within the river basin that is the source of the proposed transfer.

e. The governing body of any public water supply system that withdraws water downstream from the withdrawal point of the proposed transfer.

(e) The notice of the public hearing shall include a nontechnical description of the applicant's request and a conspicuous statement in bold type as to the effects of the water transfer on the source and receiving river basins. The notice shall further indicate the procedure to be followed by anyone wishing to submit comments on the proposed water transfer.

(f) In determining whether a certificate may be issued for the transfer, the Commission shall specifically consider each of the following items and state in writing its findings of fact with regard to each item:

(1) The necessity, reasonableness, and beneficial effects of the amount of surface water proposed to be transferred and its proposed uses.

(2) The present and reasonably foreseeable future detrimental effects on the source river basin, including present and future effects on public, industrial, and agricultural water supply needs, wastewater assimilation, water quality, fish and wildlife habitat, hydroelectric power generation, navigation, and recreation. Local water supply plans that affect the source major river basin shall be used to evaluate the projected future municipal water needs in the source major river basin.

(2a) The cumulative effect on the source major river basin of any water transfer or consumptive water use that, at the time the Commission considers the application for a certificate is occurring, is authorized under this section, or is projected in any local water supply plan that has been submitted to the Department in accordance with G.S. 143-355(*l*).

(3) The detrimental effects on the receiving river basin, including effects on water quality, wastewater assimilation, fish and wildlife habitat, navigation, recreation, and flooding.

(4) Reasonable alternatives to the proposed transfer, including their probable costs, and environmental impacts.

(5) If applicable to the proposed project, the applicant's present and proposed use of impoundment storage capacity to store water during high-flow periods for use during low-flow periods and the applicant's right of withdrawal under G.S. 143-215.44 through G.S. 143-215.50.

(6) If the water to be withdrawn or transferred is stored in a multipurpose reservoir constructed by the United States Army Corps of Engineers, the purposes and water storage allocations established for the reservoir at the time the reservoir was authorized by the Congress of the United States.

(7) Any other facts and circumstances that are reasonably necessary to carry out the purposes of this Part.

(f1) An environmental assessment as defined by G.S. 113A-9(1) shall be prepared for any petition for a certificate under this section. The determination of whether an environmental impact statement shall also be required shall be made in accordance with the provisions of Article 1 of Chapter 113A of the General Statutes. The applicant who petitions the Commission for a certificate under this section shall pay the cost of special studies necessary to comply with Article 1 of Chapter 113A of the General Statutes.

(g) A certificate shall be granted for a water transfer if the applicant establishes and the Commission concludes by a preponderance of the evidence based upon the find-

ings of fact made under subsection (f) of this section that: (i) the benefits of the proposed transfer outweigh the detriments of the proposed transfer, and (ii) the detriments have been or will be mitigated to a reasonable degree. The conditions necessary to ensure that the detriments are and continue to be mitigated to a reasonable degree shall be attached to the certificate in accordance with subsection (h) of this section.

(h) The Commission may grant the certificate in whole or in part, or deny the certificate. The Commission may also grant a certificate with any conditions attached that the Commission believes are necessary to achieve the purposes of this Part. The conditions may include mitigation measures proposed to minimize any detrimental effects of the proposed transfer and measures to protect the availability of water in the source river basin during a drought or other emergency. The certificate shall include a drought management plan that specifies how the transfer shall be managed to protect the source river basin during drought conditions. The certificate shall indicate the maximum amount of water that may be transferred. No person shall transfer an amount of water that exceeds the amount in the certificate.

(i) In cases where an applicant requests approval to increase a transfer that existed on July 1, 1993, the Commission shall have authority to approve or disapprove only the amount of the increase. If the Commission approves the increase, however, the certificate shall be issued for the amount of the existing transfer plus the requested increase. Certificates for transfers approved by the Commission under G.S. 162A-7 shall remain in effect as approved by the Commission and shall have the same effect as a certificate issued under this Part.

(j) In the case of water supply problems caused by drought, a pollution incident, temporary failure of a water plant, or any other temporary condition in which the public health requires a transfer of water, the Secretary of Environment and Natural Resources may grant approval

for a temporary transfer. Prior to approving a temporary transfer, the Secretary shall consult with those parties listed in G.S. 143-215.22I(d)(3) that are likely to be affected by the proposed transfer. However, the Secretary shall not be required to satisfy the public notice requirements of this section or make written findings of fact and conclusions in approving a temporary transfer under this subsection. If the Secretary approves a temporary transfer under this subsection, the Secretary shall specify conditions to protect other water users. A temporary transfer shall not exceed six months in duration, but the approval may be renewed for a period of six months by the Secretary based on demonstrated need as set forth in this subsection.

(k) The substantive restrictions and conditions upon surface water transfers authorized in this section may be imposed pursuant to any federal law that permits the State to certify, restrict, or condition any new or continuing transfers or related activities licensed, relicensed, or otherwise authorized by the federal government.

(*l*) When any transfer for which a certificate was issued under this section equals eighty percent (80%) of the maximum amount authorized in the certificate, the applicant shall submit to the Department a detailed plan that specifies how the applicant intends to address future foreseeable water needs. If the applicant is required to have a local water supply plan, then this plan shall be an amendment to the local water supply plan required by G.S.143-355(*l*). When the transfer equals ninety percent (90%) of the maximum amount authorized in the certificate, the applicant shall begin implementation of the plan submitted to the Department.

(m) It is the public policy of the State to maintain, protect, and enhance water quality within North Carolina. Further, it is the public policy of the State that the cumulative impact of transfers from a source river basin shall not result in a violation of the antidegradation policy set

out in 40 Code of Federal Regulations § 131.12 (1 July 1997 Edition) and the statewide antidegradation policy adopted pursuant thereto. (1993, c. 348, s. 1; 1997-443, ss. 11A.119(a), 15.48(c); 1997-524, s. 1; 1998-168, s. 4; 2001-474, s. 28.)

Supreme Court, U.S.
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No. 138, ORIGINAL

In the
Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Bill of Complaint

BRIEF OF THE STATE OF NORTH CAROLINA IN OPPOSITION

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August 7, 2007

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QUESTION PRESENTED

Whether the Court should grant South Carolina leave to file a Bill of Complaint seeking equitable apportionment of the waters of the Catawba River given that: (1) the flow of the Catawba River into South Carolina is currently being addressed in proceedings before the Federal Energy Regulatory Commission and (2) the Bill of Complaint does not identify any threatened invasion of South Carolina's rights.

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JURISDICTION

South Carolina invokes this Court's original jurisdiction under Article III, Section 2, of the United States Constitution and 28 U.S.C. § 1251(a) (2000). *See* Bill of Compl. ¶ 7.

STATEMENT

Introduction

South Carolina seeks leave to file a Bill of Complaint against North Carolina to have this Court equitably apportion the Catawba River. Br. in Supp. of Mot. for Leave to File Bill of Compl., p. 14. South Carolina further seeks to enjoin interbasin transfers of water from the Catawba River. Bill of Compl., Prayer for Relief, ¶ 2.

The Catawba River originates in the Appalachian Mountains of North Carolina near Asheville. The river runs for approximately 150 miles through North Carolina before it forms a 10 mile stretch of the border between North and South Carolina at Lake Wylie. The Catawba River then continues for roughly 60 miles through South Carolina until it flows into the Wateree River near Columbia, South Carolina. Water from the Wateree River flows into the Santee River and eventually reaches the Atlantic Ocean.

The flow of the Catawba River is controlled by a series of 11 dams and reservoirs operated by Duke Energy – six in North Carolina, one at the North Carolina/South Carolina border, and four in South Carolina. Decl. of Fransen, app. 4a. These reservoirs allow Duke Energy to generate hydroelectric power and supply cooling water for its two nuclear power

plants and three coal-fired plants in the Catawba River basin. Lake Wylie, formed by the seventh dam along the Catawba River, is located on the border between North Carolina and South Carolina. The flow of water from the Catawba River into South Carolina is therefore controlled by the Lake Wylie dam. *Id.* at 4a-5a.

Duke Energy Relicensing

In 1958, the Federal Power Commission – now the Federal Energy Regulatory Commission ("FERC") – originally licensed the 11 dams operated by Duke Energy on the Catawba River. *Duke Power Co.*, 20 F.P.C. 360 (1958). This license is for a period of 50 years and expires in August 2008. *Id.*; *accord* Decl. of Fransen, app. 5a; Decl. of Reed, app. 55a. Under this license, Duke Energy is required to release a minimum of 411 cubic feet per second ("cfs") into South Carolina from the Lake Wylie dam. Decl. of Reed, app. 58a.

In February 2003, Duke Energy began the process of relicensing these 11 dams ("the Catawba-Wateree Hydro Project"). Decl. of Reed, app. 55a. That process included conducting detailed modeling of the flow of the Catawba River. Decl. of Fransen, app. 5a-6a, 9a. This modeling takes into account anticipated water uses and withdrawals from the river through the Year 2058. *Id.* As part of its relicensing process, Duke Energy sought to include all stakeholders in an effort to build a consensus concerning the terms of a new license for these dams. Decl. of Reed, app. 55a-57a. One of the central issues in that process concerns flow of the river during times of drought. Decl. of Morris, app. 42a. During 1998-2002, the Catawba River basin experienced the most severe drought in the last 75

years. Decl of Fransen, app. 6a. This drought produced hardship in both North Carolina and South Carolina. Decl. of Morris, app. 41a-45a.

The discussions and negotiations between Duke Energy and the stakeholders ultimately led to a Comprehensive Relicensing Agreement ("CRA") that was signed by Duke Energy and 69 stakeholders in the Summer of 2006 and amended in December 2006.[1] Decl. of Reed, app. 57a, 59a, 60a. The signatories to the CRA include the South Carolina Department of Natural Resources; the North Carolina Department of Environment and Natural Resources; the South Carolina Department of Parks, Recreation and Tourism; Camden, S.C.; Rock Hill, S.C.; Kershaw County, S.C.; and Bowater, Inc. Decl. of Reed, app. 59a-60a. The CRA constitutes a request by its signatories that FERC grant Duke Energy a license, subject to the terms and conditions of the CRA, for the Catawba-Wateree Hydro Project. Decl. of Fransen, app. 6a; Decl. of Reed, app. 57a-58a.

The CRA, if its terms are adopted by FERC, provides substantial protections to South Carolina. Under the CRA, the minimum flow from the Lake Wylie dam would be increased from 411 cfs to 1,100 cfs in the absence of drought conditions. Decl. of Reed, app. 57a-58a. The CRA provides that in a Stage 1 drought, Duke Energy would be required to release a minimum of 860 cfs at the Lake Wylie dam. Decl. of Fransen, app. 7a. During a Stage 2 drought, Duke

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[1]Excerpts of the CRA are set out in the declarations of Fransen and Reed. The entirety of the agreement is available at http://www.duke-energy.com/pdfs/comp_relicensing_agreement.pdf.

Energy would be required to release a minimum of 720 cfs at the Lake Wylie dam. *Id.* During a Stage 3 drought, Duke Energy would be required to release a minimum of 700 cfs. *Id.* Thus, the CRA ensures that even under the severe drought conditions, South Carolina will receive a much greater minimum flow than is required under Duke Energy's current license.

The minimum flow of 1,100 cfs into South Carolina, along with all of the other terms of the CRA, was a negotiated compromise. Decl. of Reed, app. 57a-58a. This compromise also included an understanding that North Carolina would, over the course of the new license, make additional interbasin transfers of water from the Catawba River to North Carolina communities that lacked sufficient water supplies. Decl. of Fransen, app. 9a-10a. Specifically, the CRA includes a chart of the projected water withdrawals. *Id.* This chart includes all of the interbasin transfers that are the subject of South Carolina's motion. *Id.* The signatories acknowledge that even with these interbasin transfers, the model shows that the flow into South Carolina is "expected to meet existing and projected future (Year 2058) water use needs." *Id.* (quoting CRA).

The CRA also sets out a Low Inflow Protocol for entities that use or withdraw water from the Catawba River basin. Decl. of Fransen, app. 6a-7a; Decl. of Reed, app. 58a. This protocol requires communities to implement specific water conservation measures during times of drought. Decl. of Reed, app. 58a. Those measures become more stringent as drought conditions become more severe. *Id.* The Low Inflow Protocol is based on the principle that all water users must share the responsibility to conserve water during drought conditions. Decl. of Reed, Attach. A, app. 63a.

During the 1998-2002 drought, no such protocol was in existence to ensure water conservation.

Although Duke Energy filed its relicensing application with FERC on August 29, 2006, FERC has not yet ruled on that application. Decl. of Fransen, app. 12a; Decl. of Reed, app. 60a. It is anticipated that FERC will relicense Duke Energy's 11 dams prior to the expiration of the current permit in August 2008. Decl. of Reed, app. 61a.

North Carolina's Interbasin Transfers

North Carolina law precludes the transfer of more than two million gallons of water per day from one river basin to another without a permit. N.C. Gen. Stat. § 143-215.22I(a)(1) (2005).[2] In determining whether a permit should be granted, the North Carolina Environmental Management Commission ("NC EMC") must consider (1) the reasonableness of the transfer, (2) present and future detrimental effects

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[2]On August 2, 2007, the North Carolina General Assembly ratified House Bill 820. The bill repeals N.C. Gen. Stat. § 143-215.22I, the existing statute governing interbasin transfers, replacing it with a new N.C. Gen. Stat. § 143-215.22L. While the new statute retains many features of the existing regulatory scheme, it places additional requirements on applicants for interbasin transfers. As of the date of the filing of North Carolina's brief in this matter, the Governor had not signed the bill; therefore, it is not yet effective. However, the bill will become law, unless vetoed. N.C. Const. art. II, § 22, pt. 7.

on the river basins and (3) whether reasonable alternatives exist to the proposed transfer. N.C. Gen. Stat. § 143-215.22I(f) (2005).

In November 2004, the cities of Concord and Kannapolis, N.C. submitted a petition to the NC EMC for authority to withdraw water from the Catawba River basin and transfer that water to the Rocky River sub-basin. Decl. of Morris, app. 50a. That petition, as later amended by Concord and Kannapolis, sought a maximum transfer of 36 million gallons per day. *See* Decl. of Fransen, app. 19a.

The cities of Concord and Kannapolis were struck particularly hard by the drought of 1998-2002. Decl. of Hiatt, app. 23a-25a; Decl. of Legg, app. 31a-33a. These cities lie at the uppermost portion of the Rocky River sub-basin, a small watershed area. Accordingly, these cities can obtain only very limited yield from that watershed. Decl. of Hiatt, app. 23a, 28a; Decl. of Legg, app. 31a, 36a.

In August 2005, during the review process for the Concord and Kannapolis interbasin transfer petition, the South Carolina Department of Natural Resources ("SC DNR") informed North Carolina that the proposed interbasin transfer would not harm South Carolina. Specifically, an official with SC DNR informed Thomas Fransen of the North Carolina Division of Water Resources:

> As follow-up to our recent conversation . . . regarding the subject IBT [i.e., interbasin transfer], I've re-discussed the matter with

> [A.W. Badr][3] and our Division Director, and the consensus opinion is that the transfer is not large enough to be of concern to us. Besides, we get it back in the Pee Dee where we may need it more anyway. So, we have considered the proposed transfer and do not feel we are sufficiently aggrieved to warrant commenting on the permit application. Thanks for the info on it.

Decl. of Fransen, app. 18a (quoting SC DNR e-mail).

At its January 2007 meeting, the NC EMC approved a transfer by Concord and Kannapolis of not more than 10 million gallons per day from the Catawba River basin to the Rocky River sub-basin, which was less than a third of the cities' request. Decl. of Fransen, app. 19a. The certificate issued by the NC EMC requires Concord and Kannapolis to comply with drought restrictions virtually identical to the Low Inflow Protocol in the CRA. *Id.*

The transfer of 10 million gallons per day to Concord and Kannapolis constitutes less than 0.4% of the average flow of the Catawba River. Decl. of Fransen, app. 16a. In contrast, evaporation from cooling water used at Duke Energy's nuclear and coal-fired plants on the Catawba River consumes 5.2% of the average flow of the river. Decl. of Morris, app. 49a. Energy generated from these power plants benefits residents of both South Carolina and North Carolina.

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[3]Despite his original opinion that the subject interbasin transfer does not harm South Carolina, Badr has submitted an affidavit in support of South Carolina's motion for leave to file a Bill of Complaint.

Notwithstanding South Carolina's acknowledgment in the CRA that this interbasin transfer would not impact the ability of the Catawba River to meet current and projected water use needs through the Year 2058, South Carolina filed its motion for leave to file a Bill of Complaint on June 7, 2007. South Carolina's Bill of Complaint seeks to permanently enjoin the interbasin transfer to Concord and Kannapolis and requests an equitable apportionment of the Catawba River.

Additionally, South Carolina has filed a separate application seeking to preliminarily enjoin North Carolina from issuing any permit for an interbasin transfer from the Catawba River basin that was not approved on or before June 7, 2007. Contemporaneously with the filing of this Brief in Opposition, North Carolina is filing a response to that application.

SUMMARY OF ARGUMENT

The Court should refrain from granting South Carolina leave to file a Bill of Complaint given the pendency of proceedings currently before FERC that will substantially, if not entirely, resolve the present dispute.

Duke Energy is currently undergoing a comprehensive relicensing of the 11 dams it operates on the Catawba River, including the Lake Wylie dam that controls the flow of the river into South Carolina. As part of the FERC relicensing process, Duke Energy, South Carolina and North Carolina (through their respective agencies) have filed a submission with FERC that requests FERC to increase substantially

the minimum flow at the Lake Wylie dam into South Carolina.

Should this request be adopted by FERC, all of South Carolina's complaints concerning past droughts (particularly the drought of 1998-2002) become irrelevant. South Carolina's motion concedes that the Catawba River has ample water for interbasin transfers when drought conditions are not in effect. Moreover, under the terms that have been proposed to FERC, during drought conditions, Duke Energy will be required to release into South Carolina a minimum flow from the Catawba River that is almost double the current requirement. Thus, the FERC proceedings will impact substantially the very issue upon which South Carolina bases its complaint – the minimum flow of the Catawba River into South Carolina.

Declining to hear South Carolina's complaint at this time would be particularly appropriate given that South Carolina's Bill of Complaint relies almost exclusively upon the compromise that was negotiated between Duke Energy, South Carolina, North Carolina and other stakeholders in the FERC process. Specifically, South Carolina asserts that it should be entitled to 1,100 cfs of water from the Catawba River. Bill of Compl. ¶ 14. This argument is based on a specific section of a negotiated settlement that has been submitted to FERC – a proposal on which FERC has not yet acted. Accordingly, it would be premature for South Carolina to base its complaint upon a proposed term to a FERC license that has not yet been issued.

Finally, South Carolina has not demonstrated a threatened invasion of its rights by North Carolina. South Carolina has merely alleged that the Catawba River produces less water in times of drought. South

Carolina's allegation does not demonstrate an actual or threatened invasion of South Carolina's rights and does not constitute a claim of such serious magnitude so as to justify invoking this Court's original jurisdiction.

ARGUMENT

THE MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT SHOULD BE DENIED

Article III of the Constitution provides that this Court shall have original jurisdiction over a limited number of disputes, including those "in which a State shall be Party." U.S. Const. art. III, § 2; *see* 28 U.S.C. § 1251(a) (2000). This Court has repeatedly recognized that, even when this Court has exclusive original jurisdiction, it has substantial discretion to decline to exercise that jurisdiction. *See, e.g.*, *Mississippi v. Louisiana*, 506 U.S. 73, 76-77 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992). This discretion is exercised "with an eye to promoting the most effective functioning of this Court within the overall federal system." *Texas v. New Mexico*, 462 U.S. 554, 570 (1983).

This Court should therefore be "reluctа[nt] to exercise original jurisdiction in any but the most serious of circumstances." *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995). Accordingly, leave to file a complaint in an original action should be granted only in "appropriate cases." *Wyoming v. Oklahoma*, 502 U.S. at 451. As the Court explained:

> "[T]he question of what is appropriate concerns, of course, the seriousness and

> dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had."

Id. (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)). The Court makes "sparing use of [its] original jurisdiction so that [the Court's] increasing duties with the appellate docket will not suffer." *Illinois v. City of Milwaukee*, 406 U.S. at 94; *accord California v. Texas*, 457 U.S. 164, 168 (1982). Original jurisdiction is "'of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.'" *Mississippi v. Louisiana*, 506 U.S. at 76 (quoting *Louisiana v. Texas*, 176 U.S. 1, 15 (1900)).

The Court should deny South Carolina's motion for leave to file a bill of complaint. South Carolina's complaint does not set out an "appropriate case." First, the issue upon which South Carolina bases its complaint (the flow of the Catawba River) is currently being addressed in proceedings before FERC. Second, South Carolina has not demonstrated a threatened invasion of its rights.

I. PROCEEDINGS CURRENTLY BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION WILL DETERMINE THE WATER FLOW OF THE CATAWBA RIVER INTO SOUTH CAROLINA.

In its motion, South Carolina concedes that, in the absence of drought, ample water exists in the Catawba

River to accommodate all current and anticipated consumptive uses, including the interbasin transfers that are the subject of South Carolina's motion for leave to file a complaint. *See* Mot. for Leave to File Bill of Compl., app. 14 [hereinafter "Compl. Mot."] (affidavit of A.W. Badr) ("Most of the time, there will be ample water in the system so that water transfers out of the basin will not be harmful to South Carolina . . . ."). In his affidavit, Badr states that South Carolina did not receive an adequate flow of water from the Catawba River during the drought of 1998-2002. *Id.* at 15-16. Badr, however, recognizes that this was "mainly because [Duke Energy] did not release as much water from [its] lakes as flowed into them." *Id.* at 16.

The flow of water from the Catawba River into South Carolina is effectively controlled by Duke Energy at its Lake Wylie dam, which lies on the border between North and South Carolina. Decl. of Fransen, app. 4a-5a. Duke Energy's current FERC permit requires a minimum release from the Lake Wylie dam of 411 cfs. Decl. of Reed, app. 58a.

As Badr's affidavit tacitly acknowledges, during the 1998-2002 drought, Duke Energy chose to retain as much water as possible in order to have sufficient reserves to generate electricity. Compl. Mot., app. 16. Thus, Badr's chart of measured daily flow of the Catawba River shows many days in 2001 when the flow into South Carolina approached the minimum flow requirement of Duke Energy's FERC license (411 cfs). *Id.* at 20.

Because Duke Energy's current license expires in August 2008, proceedings currently before FERC will determine the amount of water that is released from the Lake Wylie dam into South Carolina. This

relicensing process involves substantial input from stakeholders and other interested parties. Decl. of Reed, app. 55a-57a. In the Summer of 2006, Duke Energy and 69 stakeholders (including various South Carolina agencies and local governments) entered into a Comprehensive Relicensing Agreement ("CRA") for the Catawba-Wateree Hydro Project. Decl. of Reed, app. 57a, 59a. The CRA spans 501 pages and sets out detailed provisions and requirements that the signatories are asking FERC to incorporate into Duke Energy's license to operate these dams. The CRA constitutes a negotiated compromise of the many interests of the 70 parties to the agreement. Decl. of Reed, app. 57a-58a. Part of that compromise includes specific provisions addressing the quantity of water that flows into South Carolina.

The CRA, if its terms are accepted by FERC, will substantially increase the minimum flow of the Catawba River into South Carolina. While Duke Energy's current license provides for a minimum flow of 411 cfs at the Lake Wylie dam, the CRA would provide for a minimum flow of 1,100 cfs.[4] Decl. of

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[4]In its motion, South Carolina asserts that it should be entitled to 1,100 cfs from the Catawba River as measured 3.5 miles downstream of the Lake Wylie dam. *See* Bill of Compl. ¶ 14; Br. in Supp. of Mot. for Leave to File Bill of Compl., app. 15, 20. South Carolina, however, neglects to inform the Court that it withdraws substantial quantities of water upstream of this measuring point. Specifically, South Carolina withdraws 57 million gallons per day from Lake Wylie, which runs along the border between North Carolina and South Carolina. Decl. of

Reed, app. 57a-58a. Moreover, even during a Stage 3 drought, the CRA would ensure that the amount of water Duke Energy releases from the Lake Wylie dam would be almost double the amount that Duke Energy was required to release during the 1998-2002 drought. Decl. of Fransen, app. 7a. Specifically, during a Stage 3 drought, Duke Energy must release a minimum of 700 cfs from the Lake Wylie dam. *Id.*

Thus, should the CRA be accepted by FERC, the flow of water into South Carolina will be substantially greater than in recent droughts. In fact, South Carolina, through its agencies, has "acknowledge[d] that modeling and evaluation have predicted that . . . the flow releases anticipated [into South Carolina] are expected to meet existing and projected future (Year 2058) water use needs" should the terms of the CRA be adopted by FERC. Decl. of Fransen, app. 9a-10a. Moreover, at the time this acknowledgment was signed by various South Carolina agencies and local governments, the signatories knew and understood that these projections took into account all of the interbasin transfers that are the subject of South Carolina's Bill of Complaint. Decl. of Fransen, app. 9a.

South Carolina's complaint is premised upon the argument that, unless North Carolina's current interbasin transfers are set aside, South Carolina will not receive an adequate flow of water in the event of a severe drought. In support of this argument, South Carolina describes the flow of the river at the South Carolina border during the 1998-2002 drought – the worst drought in over 75 years. The flow of the river at that time, however, is largely irrelevant. Both Duke

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Fransen, app. 17a.

Energy and 69 stakeholders have asked FERC to impose license conditions that will require Duke Energy to release a much greater flow of water from Duke Energy's reservoir at the South Carolina border. Should this license condition be adopted by FERC, South Carolina is assured of receiving substantially greater flow, even in times of drought.[5]

Thus, the FERC proceeding stands as a forum that can substantially resolve the matters in dispute. *See Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). The comments Bowater, Inc. recently filed with FERC illustrate this point. In its motion for leave to file a Bill of Complaint, South Carolina describes at length the impact of the 1998-2002 drought on Bowater. In its submissions to FERC, Bowater, however, urges FERC to adopt the terms of the CRA and asserts that the proposed licensing terms will allow for sufficient flow of water into South Carolina:

> From Bowater's perspective, the CRA achieves adequate and predictable flow releases from the Wylie Hydro that support the raw water quantity needs and discharge permit requirements for our facility located in Catawba, South Carolina which is one of the

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[5]Under the CRA, the minimum flow into South Carolina would be increased from the existing minimum flow of 411 cfs by an additional 449 cfs during a Stage 1 drought (from 411 cfs to 860 cfs), 309 cfs during a Stage 2 drought (from 411 cfs to 720 cfs) and 289 cfs during a Stage 3 drought (from 411 cfs to 700 cfs). Decl. of Fransen, app. 7a. This additional flow dwarfs the water needed for interbasin transfers in North Carolina.

> largest coated paper mills in the world. In addition, the long-range planning embodied in the Water Supply Study and in the Low Inflow Protocol provides Bowater as well as the entire Catawba-Wateree Basin with a level of drought protection that has not existed before.

Decl. of Fransen, app. 11a (quoting Bowater's FERC submission).

The FERC proceeding stands to substantially, and perhaps entirely, address the issue that South Carolina has raised in this action (i.e., the minimum flow of the Catawba River into South Carolina). Should FERC implement license terms inconsistent with the CRA, FERC's determination may be appealed to either the United States Court of Appeals for the Fourth Circuit or the United States Court of Appeals for the District of Columbia. 16 U.S.C. § 825*l* (2000).

Additionally, even assuming that the FERC decision does not resolve South Carolina's problem, it would be premature for this Court to accept South Carolina's complaint until the FERC relicensing process is complete. Until a license is issued by FERC, both South Carolina and North Carolina will be forced to argue to this Court the meaning and significance of an agreement (the CRA) that may or may not be adopted by FERC. *See* Bill of Compl. ¶ 14 (relying upon 1,100 cfs set out in CRA).

South Carolina's Bill of Complaint relies upon a negotiated compromise between North Carolina, South Carolina and various interested parties in a FERC proceeding. *Id.* Notwithstanding the delicate balance of this compromise, South Carolina is asking this Court to accept the portion of the compromise that South Carolina likes (a minimum flow of 1,100 cfs),

while throwing out the portion of the compromise it dislikes (the interbasin transfers referenced in the compromise). Thus, South Carolina relies on the CRA in representing to this Court the flow of water from the Catawba River that it believes it should be allocated. South Carolina, however, ignores the fact that a part of the compromise of the CRA was an acknowledgment that the Catawba River has sufficient flow to sustain the interbasin transfers at issue without impacting other current and projected uses of the river. A determination of the meaning and effect of the CRA, however, would be premature until such time as FERC acts on that agreement.

The judicial resources of this Court would be largely wasted if South Carolina's complaint is accepted at this stage and the parties are required to base their arguments upon a FERC license that has not yet been issued.

II. SOUTH CAROLINA HAS NOT DEMONSTRATED A THREATENED INVASION OF ITS RIGHTS.

South Carolina makes the conclusory allegation that transfers of water from the Catawba River by Charlotte, Concord and Kannapolis, N.C. "exceed North Carolina's equitable share of the Catawba River." Bill of Compl. ¶ 4. South Carolina purports to bolster this allegation by asserting that in the FERC relicensing of the Catawba-Wateree Hydro Project, it was agreed by stakeholders that the flow of water into South Carolina should be 1,100 cfs. Bill of Compl. ¶ 14 (relying upon CRA). The Complaint further alleges that in its natural state, the Catawba River would often not deliver 1,100 cfs. Bill of Compl. ¶ 16.

The gist of South Carolina's complaint is that the Catawba River produces less water in times of drought – the exact same condition that occurs in North Carolina. In fact, consumptive uses in North Carolina are small compared to the overall flow of the Catawba River. By far the most significant influences on downstream flows are climatic factors such as drought, and the operation by Duke Energy of its hydroelectric facilities under license by FERC.

The impacts about which South Carolina complains were the result of drought, and not any actions of North Carolina. In fact, during the period in question, North Carolina communities suffered equally if not more than did South Carolina. For example, Lake Rodhiss, which supplies water for the towns of Valdese, Granite Falls and Lenoir, North Carolina, suffered an algal bloom that began in 2001 and continued into 2002, resulting in taste and odor complaints from water users. *Compare* Decl. of Morris, app. 43a, *with* Compl. Mot., app. 38 (declaration of Donna Lisenby) (water for Camden, S.C. had odor and taste problems). Lake Hickory, which supplies water for the City of Hickory, North Carolina, suffered an algal bloom in 2002 and also caused complaints from its water users. Decl. of Morris, app. 43a. Incidents, such as the one in Camden, S.C. about which South Carolina complains, are not uncommon during drought and do not render water unsafe to drink. *Id.* at 43a-44a.

Furthermore, boat ramps in North Carolina were closed by Duke Energy not only on Lake Wylie, but also on Lake James and Lake Norman (both of which lie wholly within North Carolina) due to the fact that the reservoir levels were so low as to create a safety hazard for boaters. Decl. of Fransen, app. 19a-20a.

Moreover, water shortages occurred in Cherryville, N.C. where in mid-August 2002, the town used an emergency pump on a flatbed trailer (provided by the North Carolina Division of Emergency Management) to pump water from a hydrant on the Lincoln County water system into a hydrant on the Cherryville water system. Decl. of Morris, app. 44a-45a. Immediately thereafter, Cherryville drilled an emergency well to provide adequate water supply for its population. *Id.* at 45a.

Of course, the severity of a drought is not in any party's control. But the operations of the hydroelectric facilities can be manipulated to mitigate drought impacts. Over the past few years, both States, learning from their experiences in 1998 to 2002, have sought to craft a new regime for the operation of the dams on the Catawba River in order to diminish the impacts of drought in both States in the future. Thus, although Bowater alleges that its manufacturing operations were impacted in 2002 by the drought, that same corporation has enthusiastically hailed the CRA as providing "adequate and predictable flow releases" that support Bowater's withdrawal and discharge needs and that are "sustainable into the future." Decl. of Fransen, app. 11a (quoting Bowater submission to FERC). Far from being the cause of South Carolina's woes, North Carolina was also a victim of the 1998-2002 drought, as well as a willing and motivated partner in successful efforts to address the situation.[6]

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[6]In addition to relying upon the harm created by the 1998-2002 drought, South Carolina also alleges, based on the report of A.W. Badr, that it would receive 1,100 cfs more frequently under the so-called "natural flow" of the

South Carolina appears to be blaming North Carolina for the fact that South Carolina did not get sufficient rainfall during 1998-2002. South Carolina merely suffered the effects of an extreme drought similar to the effects suffered by others in the region, including North Carolina. South Carolina's allegation simply does not constitute a claim of such serious magnitude so as to require relief from this Court. *See Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995).

Should this Court grant South Carolina's motion for leave to file a Bill of Complaint, several million dollars of attorney and expert witness fees will be expended by the parties in bringing this matter to trial before a Special Master. Environmental regulators in both States will be diverted from their primary job of protecting the environment. More importantly, the resources of this Court should not be consumed by South Carolina based merely upon statements tending

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Catawba River. This analysis is unrealistic. Badr's "natural flow" assumes that North Carolina would consume absolutely no water from the river. It also assumes that the complex of hydropower dams would not exist. This is obviously not a valid basis for evaluation. *See* Decl. of Fransen, app. 12a-15a. Moreover, Badr's report focuses on flows in 2001 when Duke Energy was storing water in case the drought worsened. In the Fall of 2002, when the drought was at its worst, Duke Energy was able to use this stored water to provide South Carolina with enhanced flows that would not have been available even under the unrealistic expectations of the "natural flow" scenario. *See id.* at 14a-15a.

to show that five years ago the Catawba River basin experienced the worst drought in over 75 years.

CONCLUSION

The motion for leave to file a Bill of Complaint should be denied.

Respectfully submitted,

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Attorney General of North Carolina

Christopher G. Browning, Jr.*
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August 7, 2007

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APPENDIX

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No. 138, Original

In the

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Complaint

DECLARATION OF THOMAS C. FRANSEN

I, Thomas C. Fransen, do hereby declare, certify, and state that:

1. Since November 1989 I have served as the Head of the River Basin Management Section of the Division of Water Resources ("the Division" or "DWR") for the North Carolina Department of Environment and Natural Resources ("DENR") (including predecessor entities).

2. I hold a Masters of Civil Engineering from North Carolina State University, a Bachelor of Science with a major in Civil Engineering from North Carolina State University and

a Bachelor of Arts from Carthage College (Wisconsin) with majors in Biology and Natural Sciences.

3. I have also served as an environmental engineer in the Hydrology and Management Section (now the River Basin Management Section) of the Division from May, 1984 to October, 1989.

4. In my present position as Head of DWR's River Basin Management Section, I provide professional and technical guidance and expertise to assist the State in coordinating the beneficial use and conservation of the State's surface water and groundwater. My responsibilities include providing technical and regulatory assistance to local governments, industry, farmers, etc. regarding compliance with State water resource planning and informational requirements, assisting the development of rules designed to reduce water use and conserve water during drought, providing technical support (including water use, reservoir level, and instream flow projections) for State involvement in Federal Energy Regulatory Commission ("FERC") licensing actions and management of U.S. Army Corps of Engineers and Tennessee Valley Authority dams, and assisting the State's Environmental Management Commission ("EMC") in implementing the State's interbasin transfer law and a variety of other water resource management laws and rules. My responsibilities routinely require me to interact with other federal, State, local, and Tribal governments, large and small businesses, and private citizens.

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5. The Division is North Carolina's governmental agency primarily charged with monitoring and managing the State's water resources, to ensure that the waters of North Carolina are developed and managed in a sustainable manner for the benefit of all water users.

6. Among its other duties, the Division serves as staff to the EMC regarding water resources management issues.

7. The Division, and specifically DWR's River Basin Management Section, receives any petitions made to the EMC for transfers of water between river basins as required by North Carolina General Statutes §143-215.22I. Currently, there are no petitions pending pursuant to this statute for any interbasin transfer from the Catawba River basin (or any other basin). I have periodic discussions with representatives from Union County, North Carolina regarding the County's water needs. It is my understanding that the County is exploring options other than transferring water out of the Catawba River basin and, if the County believes a transfer is necessary, it intends to limit the amount of that transfer to no more than the amount already authorized by South Carolina. In short, no additional regulated transfers from the Catawba River are imminent.

8. The Secretary of DENR has authority under North Carolina General Statutes §143-215.22I(j) to authorize temporary interbasin transfers for short-term emergencies. I am familiar with only one such authorization. That authorization did not involve the Catawba River basin

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(including the South Fork Catawba River Sub-basin) at all. There are no requests pending for temporary authorization to transfer water pursuant to section 143-215.22I(j).

9. I am personally familiar with the Catawba River and the Catawba River basin and have performed and been a part of significant research, analysis, and regulatory projects directly addressing or affecting flows in the Catawba River. (A part of the Catawba River in South Carolina is called the Wateree River. I will refer to it generally as the Catawba River.)

10. I am also personally familiar with various studies made of the Catawba River basin, and with various data that provide historic information about the Catawba River basin such as stream flow, precipitation, and use of the waters of the Catawba River.

11. Duke Energy Carolinas LLC ("Duke") owns and operates 11 hydroelectric dams on the Catawba River. All of these dams are on the main stem of the Catawba River. These facilities and other appurtenant lands, waters and improvements together are known as the Catawba-Wateree Project and are licensed by FERC as Project No. 2232. Six of those reservoirs are located entirely in North Carolina, four are located entirely in South Carolina, and one reservoir (Lake Wylie) straddles the North Carolina-South Carolina border. Because the Lake Wylie dam is in South Carolina and is the closest of the Catawba-Wateree dams to the border, the outflow

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from Lake Wylie can serve as an indicator of flow from the Catawba River-Wateree Project into South Carolina.

12. Data maintained by United States Geologic Survey ("USGS") shows that the average annual average daily flow of the Catawba River about 3.5 miles downstream from the Lake Wylie dam (USGS Gage No. 02146000) is 4,253 cubic feet of water per second ("cfs") (2,749 million gallons of water per day ("mgd")) for the 63 years for which data was available between October 1, 1896 to September 30, 2006, i.e. the period of record.

13. The FERC license for the Catawba-Wateree Project expires in 2008, and Duke is seeking a new 50-year license for the project (ending in 2058). For the past several years, many stakeholders worked closely to study various aspects of the Catawba-Wateree Project in order to create an appropriate record for relicensing. I personally participated in this FERC proceeding, along with other DWR staff, on behalf of DWR and DENR. South Carolina state agencies and Ms. Donna Lisenby of the Catawba Riverkeeper Foundation, Inc. also participated in this proceeding.

14. During the relicensing process for the Catawba-Wateree Project a high priority has been to determine if the basin could withstand the increased demands projected for the future, including larger water supply withdrawals (which may include interbasin transfers), increased releases from reservoirs for aquatic habitat, greater consumptive use of cooling water

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for electric power generation, and maintenance of critical reservoir elevations to assure operability of water supply intakes. Therefore, Duke worked with water supply users (including those in South Carolina) and other interested parties to project water needs between 2048 and 2058. From this effort HDR Engineering, Inc. of the Carolinas produced The Duke Energy Water Supply Study ("Water Supply Study"). The Water Supply Study independently concluded that all projected future demands on the Catawba River basin, including those of water users located in South Carolina, can be met for more than 40 years into the future without violating the critical reservoir elevations needed to assure the operation of pubic water supply sources. In particular, the Water Supply Study concluded that these future demands could be met even if the most severe drought of the 75-year period that was evaluated, i.e. the exceptional drought of 1998-2002, reoccurred.

15. The relicensing process resulted in a Comprehensive Relicensing Agreement ("CRA"). The signatories to the CRA have urged FERC to incorporate into the new license the specific provisions that the signatories drafted and upon which they all agreed.

16. If FERC adopts the CRA, Duke and the signatories to the CRA would be subject to a Low Inflow Protocol ("LIP") during drought conditions. As flow conditions in the basin worsen, the LIP would require water users to implement increasingly stricter drought management measures. In this

manner, the LIP would delay the point at which the Project's usable water storage is fully depleted while providing for the competing uses of the Project's waters, although in a reduced capacity as would be sensible in a drought.

17. Under the LIP, during times that water inflow is not adequate to meet all of the normal demands for water, Duke would reduce the volume of water it discharges for hydroelectric power generation and other instream uses. For example, under a Stage 1 low inflow condition (moderate drought), Duke may reduce releases from Lake Wylie to 860 cfs. Under a Stage 2 condition (severe drought), Duke may reduce Wylie releases to 720 cfs, and under Stage 3 (exceptional drought), 700 cfs. Similarly, public water suppliers would be required to implement demand reduction measures that become more stringent as the stage of the low inflow condition increases.

18. A Stage 4 condition under the LIP would be a catastrophic event and has never occurred during the period of record. Flows from Wylie would remain at 700 cfs only as long as inflow and stored water were available. The drought of record -- the 1998-2002 event -- would have only reached Stage 3 under the LIP.

19. The flow discharged from each of the hydroelectric plants on the Catawba River is controlled by Duke's release of water from the associated reservoir. For this reason the negotiation of the CRA, and in particular the LIP, was critical

to ensuring that Duke will provide adequate releases during low inflow conditions.

20. The CRA also would create a Catawba-Wateree Drought Management Advisory Group ("CW-DMAG") that would meet annually and more frequently in advance of and during low inflow periods. The South Carolina Department of Natural Resources ("SCDNR") and the South Carolina Department of Health and Environmental Control ("SCDHEC") have been invited to sit on the CW-DMAG (along with two North Carolina agencies). The CW-DMAG would serve as a forum to review low inflow practices and discuss program improvements.

21. During the relicensing proceedings, the stakeholders participated in the development by Devine Tarbell & Associates ("DTA") of a computer model of the waters of the Catawba River basin. The most recent version of the model -- known as the Computer Hydro-Electric Operations and Planning Software or "CHEOPS" -- was version 8.7, which was released in March 2006. This model was developed to describe the effects of water-quantity-related operational changes and physical modifications to the hydropower facilities operated by Duke in the Catawba River basin and to thereby allow stakeholders to explore the long-term impacts of different hydropower operating restrictions and LIP parameters. The CHEOPS model used a 75-year historical record of inflows for the Catawba River system from 1929 to 2003.

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22. CHEOPS version 8.7 (March 2006) was used by Duke to support its FERC license application and, in the process, to project the effects of the CRA. Thus, all signatories to the CRA were able to assess the impacts of the CRA on their future needs and operations by reviewing these CHEOPS runs.

23. Future river flow and reservoir levels were modeled based on the projection that net withdrawals from the Catawba River basin for all uses (in both North and South Carolina) would more than double between 2008 and 2058. These data were summarized in Appendix H of the CRA. Appendix H showed that net withdrawals in 2005 upstream of the Wylie dam were 226.8 mgd, and this is projected to increase to 524.9 mgd in 2058. (In 2005, 88.1 mgd of these net withdrawals were returned to the Catawba River below the Wylie dam; in 2058, 177.1 mgd are projected to be returned below Wylie.) Appendix H also showed that as of 2005 only 13 mgd were actually removed via interbasin transfer from the Catawba basin above Lake Wylie dam (despite authorization of greater amounts) and that this interbasin transfer amount was projected to be 85 mgd in 2058.

24. The CRA (section 5.3) includes the following statement:

> The Parties acknowledge that modeling and evaluation have predicted that, for the New License term, the flow releases anticipated from the Bridgewater, Wylie, and Wateree developments are

> expected to meet existing and projected future (Year 2058) water use needs, as identified in Appendix H, for intakes located in the downstream Regulated River Reaches below these developments. In addition, the modeling predicted that, during the New License term, the reservoir levels set forth in the proposed Reservoir Elevations License Article including Critical Reservoir Elevations identified in the Low Inflow Protocol (see Appendix C), are expected to meet the existing and projected future (Year 2058) water use needs, on a per-reservoir basis, as identified in Appendix H for water use needs located on the Project's reservoirs. These studies also predicted that the operating parameters contained in this Agreement, modeled using CHEOPS with the Low Inflow Protocol included in the model, provide reservoir levels and flows that are expected to meet at least the current minimum requirements to support water intake operations identified by the Licensee and the other water users as projected through the Year 2058. The Parties also acknowledge that those minimum requirements, along with facts, assumptions, and analytical capabilities may be subject to change and review during the term of the New License.

25. Bowater Inc. (Catawba, South Carolina) signed the CRA. On April 23, 2007, J.M. Forrest, Vice President of Catawba Operations for Bowater Inc., submitted a letter to the

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FERC docket for the Catawba-Wateree Project relicensing that read, in part, as follows:

> From Bowater's perspective, the CRA achieves adequate and predictable flow releases from Wylie Hydro that support the raw water quantity needs and discharge permit requirements for our facility located in Catawba, South Carolina which is one of the largest coated paper mills in the world. In addition, the long-range planning embodied in the Water Supply Study and in the Low Inflow Protocol provides Bowater as well as the entire Catawba-Wateree Basin with a level of drought protection that has not existed before.
>
> * * *
>
> The [Catawba-Wateree Relicensing Stakeholder] Team's [*sic*] studies, water supply projections, aquatic habitat modeling, reservoir operations modeling, Performance Measures Spreadsheets, and the Low Inflow Protocol are compelling evidence that not only did the Team balance the benefits but that the results are also factually sound and sustainable into the future.

This document is available from FERC's eLibrary at www.ferc.gov using the Accession Number 20070426-0278.

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26. The City of Camden, South Carolina signed the CRA. To my knowledge, the City has not submitted any comments to FERC.

27. FERC has not yet taken final action on Duke's relicensing application.

28. Based on discussion and data in the report attached to Dr. Badr's affidavit ("Badr Report"), Division personnel, under my supervision, were able to re-create the so-called "natural flow" scenario discussed in the Report. The output from the Division's re-creation matched the available output from the Badr Report with 100% accuracy.

29. Based on the Division's re-creation, it is apparent that the so-called "natural flow" data set is premised on North Carolina consuming *absolutely no water from the Catawba River*. The complete prohibition of use of water from the Catawba River by North Carolina sources would force the closure of Duke's nuclear and coal-steam power plants (which serve both North Carolina and South Carolina), cut off water service to millions of residential and business users (including many in York County and Clover, South Carolina who receive water from North Carolina systems), and prohibit farmers from irrigating crops. These users could seek water from other sources, such as other nearby rivers (which all flow into South Carolina) or groundwater. Even if sufficient groundwater were available (which it is likely not), such massive use of

groundwater would invariably impair the ability of the Catawba River to sustain base flows during drought.

30. The Badr Report also assumed that the reservoirs on the Catawba River in North Carolina do not exist. One function of these reservoirs is to store water during high flow periods in order to enhance flows during drought for downstream users, including those in South Carolina. Even if the reservoirs were operated to simulate "natural flow" from Lake Wylie, reservoir water levels would decline sharply and remain well-below historic levels due to evaporation, which would dramatically and adversely impact area communities and lake-related business and negate the ability of the system to enhance flows during drought.

31. Due to these flaws in the Badr Report's "natural flow" analysis, the analysis is of no real value in evaluating the impact of North Carolina's consumptive withdrawals from the Catawba River or determining each State's "fair share" of the river's water.

32. The Badr Report compared the so-called "natural flow" to operation of the Catawba-Wateree Project in 2001. When the new FERC license is issued, the operating parameters for the Project will most likely be substantially revised. Under the current license, Duke is required to release from Lake Wylie only 411 cfs. The signatories to the CRA (including Duke) have asked FERC to require that Duke release at least 1,100 cfs from Lake Wylie. The signatories to

the CRA have agreed that it is appropriate to allow Duke to reduce flows during drought (to as low as 700 cfs) and during maintenance and emergency periods. Therefore, the comparison in the Badr Report between so-called "natural flow" and flows at the Rock Hill gage in 2001 are based on a flow regime that will likely soon be obsolete and replaced by a far more protective and broadly supported regime.

33. The Badr Report focuses on 2001, but the most critical period of the 1998-2002 drought was between July 1 and September 15, 2002. The CHEOPS analysis of the final CRA terms projected that if this exceptional drought occurred again, the flows at Lake Wylie during the equivalent period would not drop below 700 cfs, even with the level of consumptive withdrawals in North Carolina projected after 2050. In contrast, the Badr Report's so-called "natural flow" (which assumes no consumptive withdrawals in North Carolina) during such an exceptional drought period would be below 700 cfs over 40% of the time. Thus, the Badr Report fails to demonstrate that the Catawba River, in its so-called "natural" state, could even provide the flows to which South Carolina alleges it is entitled. Nor does the Badr Report show that the "natural flow" is more beneficial to South Carolina at the most critical stages of an exceptional drought than the flows that would be required under a new FERC license that adopts the negotiated CRA provisions. Even during 2001, and with significantly increased consumptive withdrawals in North Carolina, the CHEOPS analysis shows that the CRA would have sustained flows from Lake Wylie above 720 cfs at all

times. Under the "natural flow" analysis, with no consumptive withdrawals in North Carolina, the flow from Wylie would have failed to reach 720 cfs on 13 days.

34. In response to a petition filed in 2004 by the Cities of Concord and Kannapolis, North Carolina to transfer water from the Catawba River basin and the Yadkin River basin to the Rocky River sub-basin, the Division (in its capacity as staff to and in order to assist the EMC) analyzed the projected water needs of these communities, the water availability of the Catawba and the Yadkin Rivers, and the environmental impacts of the proposed transfers. Initially, Concord-Kannapolis requested a transfer of a total of 38 mgd from a combination of the Catawba and the Yadkin River basins, with a request for authorization to transfer the full 38 mgd out of the Catawba River if no withdrawal was permitted from the Yadkin River. (As discussed below, the EMC ultimately authorized only a 10 mgd transfer from the Catawba.)

35. The computer modeling results used to predict the effects of the proposed interbasin transfer were developed using the most recent version of the CHEOPS model. The modeled effects of the proposed interbasin transfer on reservoir levels for Lake James, Lake Norman, Lake Wylie and Lake Wateree were chosen as representative of the impacts and were presented in the environmental impacts statement ("EIS"). The modeling results for all 11 reservoirs were made available at http://www.ncwater.org/Data_and_Modeling/Catawba, DWR's

website. The model incorporated the most recent version of the LIP.

36. The analysis was based on projections of water supply needs for the year 2035, including municipal water supply, power plant cooling, agricultural, and industrial demands, based on DTA's Water Supply Study (discussed above). Thus, the analysis used projected increases in each category of water uses and evaluated the incremental effect of the Concord-Kannapolis interbasin transfer at its peak for the 2035 planning horizon.

37. As part of this analysis, the impacts of a 10 mgd transfer of water out of the Catawba River basin were assessed. Ten mgd from the Catawba River represents 0.36% of the average of the annual averages of daily flows of the river near Rock Hill, South Carolina (USGS Gage No. 02146000) for the period of record.

38. The analysis showed that a transfer of 10 mgd out of the Catawba River basin would not change the daily average flows discharged from Lake Wylie Dam when those daily averages were 1,221 cfs or below. Consequently, a 10 mgd transfer would not change the number of days on which Lake Wylie flows fell below 1,100 cfs. The analysis also showed that a 10 mgd transfer would not change the number of months during which the Catawba River basin was in a declared drought under the LIP. The model demonstrated that during the worst drought of record, a 10 mgd interbasin transfer would

result in a decline in the water level at Lake Wylie of less than one inch.

39. The results for Lake Wateree and all other reservoirs in South Carolina that were modeled, i.e. all reservoirs of the Catawba-Wateree FERC project, showed similarly insignificant changes in water levels and flows.

40. Assessment of low flow periods is critical to evaluating the ability of a river system to sustain withdrawals and to assimilate wastewater. Wastewater discharge permit limits are determined based on low flow parameters to ensure that discharges can be assimilated even under low flow conditions. The CHEOPS model shows that there is no diminution in the Catawba River's ability to assimilate pollutants or sustain other consumptive withdrawals as a result of a 10 mgd interbasin transfer because there are little or no projected effects on low flows or low reservoir levels.

41. According to the Water Supply Study, in 2005 South Carolina sources withdrew from Lake Wylie about 57.2 mgd (88.7 cfs), while returning only a small fraction of that water to the Catawba River.

42. Projections show that in 2008 93.7% of the flow of the Catawba River remains in the basin as measured at Lake Wateree, South Carolina.

Fransen Declaration, Aug. 3, 2007

43. On or about August 1, 2005, I met with Danny Johnson, the Assistant Deputy Director of the Land, Water and Conservation Division of SCDNR. At this meeting, Mr. Johnson and I discussed, among other things, the pending petition by Concord and Kannapolis to transfer up to 38 mgd out of the Catawba River basin. Following that meeting, I received an electronic mail message on August 5, 2005 from Mr. Johnson. The body of the message read, in full:

> As follow-up to our recent conversation in Badin regarding the subject IBT [interbasin transfer], I've re-discussed the matter with Bud and our Division Director, and the consensus opinion is that the transfer is not large enough to be of concern to us. Besides, we get it back in the [Yadkin-]Pee Dee [River] where we may need it more anyway. So, we have considered the proposed transfer and do not feel we are sufficiently aggrieved to warrant commenting on the permit application. Thanks for the info on it.

It is my understanding that the "Bud" mentioned in this e-mail is Dr. A.W. "Bud" Badr of SCDHEC. I forwarded this message to DWR staff for inclusion in the EMC's decision-making record.

44. To my knowledge, neither SCDNR nor SCDHEC submitted any further substantive comments or any analysis of water flows, model results, lake levels, water use projections, or any other technical analysis whatsoever during the interbasin

transfer proceeding. However, on October 31, 2006, the Division received a brief letter from SCDHEC by which SCDHEC deferred to the positions of the South Carolina Governor and General Assembly opposing a transfer from the Catawba River of 36 mgd or more.

45. Despite the initial request by Concord and Kannapolis to transfer 38 mgd from a combination of the Catawba and Yadkin River basins, in January 2007 the EMC approved 10 mgd transfers from each of the Catawba River and the Yadkin River to the Rocky River (which flows back into the Yadkin River before reaching South Carolina). This reduction was due to the EMC's independent assessment of the two cities' need for the water.

46. Pursuant to the interbasin transfer authorization issued to Concord and Kannapolis, the cities must abide by drought restrictions that are virtually identical to those of the LIP. Moreover, the cities' obligation to initiate drought mitigation measures is triggered by drought conditions in any one of three basins: the Catawba River, the Rocky River, or the Yadkin River.

47. I personally observed on November 26, 2001 that Duke closed the Blythe Landing boat ramp on Lake Norman in North Carolina due to low reservoir levels caused by drought. I am aware that Duke closed a quarter of the boat ramps on its Catawba River reservoirs because low reservoir levels caused

by drought created safety hazards for boaters. Lakes James, Norman, and Wylie were the most affected by these closures.

48. It is my understanding that several local governments in North Carolina and South Carolina, as well as the Catawba Riverkeeper Foundation, Inc., have filed petitions pursuant to the North Carolina Administrative Procedure Act seeking review of the EMC's approval of the Concord and Kannapolis interbasin transfer. These petitions are pending in the North Carolina Office of Administrative Hearings and have been assigned case numbers 07 EHR 0476 and 07 EHR 0480, respectively.

49. Contrary to the allegation of the Catawba Riverkeeper (Motion for Leave to File Bill of Complaint ("Bill of Compl."), App. 41), not all interbasin transfers authorized by North Carolina cause "an increase in the amount of treated waste water discharged into the Yadkin/Pee Dee Rivers, thereby removing waste assimilation capacity from the South Carolina portion of the Pee Dee River" because not all of the transfers authorized allow water to be transferred to the Yadkin/Pee Dee River system. Moreover, as Mr. Johnson (SCDNR) indicated in his electronic mail message that I quoted earlier, adding water to the Yadkin/Pee Dee system via interbasin transfer may be beneficial to that system.

50. Under the State's Water Use Act of 1967, N.C. Gen. Stat. §143-215.11 - .19, the EMC retains the authority to mandate dramatic reductions in water use if it were to conclude

that the ability of Catawba River to sustain its uses was threatened. For example, the EMC has mandated phased reductions of groundwater use of up to 75% in the North Carolina's Central Coastal Plain in order to sustain the viability of the Cretaceous Aquifers. 15A N.C. Admin. Code 2E .0500. Based in part on the results of the modeling performed for the Catawba-Wateree Project relicensing process and the Concord-Kannapolis interbasin transfer, it is my opinion that regulation of the Catawba River under the Water Use Act is not necessary or appropriate to protect its uses, and that contrary to the opinion of the Catawba Riverkeeper (Bill of Compl., App. 42), the Catawba River has not "reached its threshold for sustainable use."

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 3, 2007.

/s/ Thomas C. Fransen
Thomas C. Fransen

No. 138, Original

In the

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Complaint

DECLARATION OF W. BRIAN HIATT

I, W. Brian Hiatt, do hereby declare, certify, and state that:

1. I am the City Manager of Concord, North Carolina. I have served as City Manager since 1998.

2. I hold a Bachelor of Science degree (summa cum laude) in History and Government Service from Appalachian State University, and a Master of Public Administration from the University of North Carolina at Chapel Hill.

Hiatt Declaration, Aug. 3, 2007

3. Combined, the Concord and Kannapolis water systems provide almost 100 percent of the public water supply in Cabarrus County, North Carolina. Concord and Kannapolis share the same watershed, the upper portion of the Rocky River sub-basin. This watershed is relatively small.

4. The drought that occurred in central and western North Carolina and South Carolina beginning in 1998 and continuing into 2002 (the "Drought") significantly impacted communities such as Kannapolis and Concord in Cabarrus County, North Carolina. The Drought impacted Cabarrus County communities for a longer period of time than elsewhere, into 2003, because of the small size of their drinking water watersheds, all of which are in the upper portion of the Rocky River sub-basin.

5. The City of Concord became aware of the impact of the Drought as early as 1998. Initial efforts to develop agreements for water supply with Kannapolis and other neighboring communities began at that time.

6. Concord cooperated closely with the City of Kannapolis during the Drought regarding use of water resources. The two cities developed very similar water restrictions.

Hiatt Declaration, Aug. 3, 2007

7. In 2002, Concord changed its water rate structure to strongly discourage excessive water use. Mandatory water use restrictions were in place for nearly three years, from February 2, 2001 through November 14, 2003. Irrigation was not allowed for over two years, from February 2, 2001 through June 4, 2003. Subsequently, irrigation was allowed only during the hours between 6:00 p.m. and 6:00 a.m., because irrigating during the day facilitates wasteful evaporation.

8. Concord had a heavy advertising campaign to reach its water users during the Drought, including mailers, newspaper advertisements, and billboards, that outlined the conditions of the drought and, depending on drought stage, the voluntary and/or mandatory water use measures for households to implement.

9. When Governor Michael F. Easley called for a 20 percent reduction in water use throughout North Carolina during the summer of 2002, Concord had already achieved a reduction in water use of nearly 30 percent, even though this resulted in substantial losses in the city's water and wastewater revenue.

10. Because this watershed is small, it took many months of above average precipitation to

effectively end the Drought and replenish water supplies. Although the drought conditions ended in much of North Carolina and South Carolina in October/November 2002, water restrictions remained in place for Concord until the fall of 2003.

11. After the Drought, water use in the Concord system has changed even for non-drought periods. Per capita use has declined from when it was previously evaluated during the water and wastewater master planning process conducted from 2000 through 2002. This decline is attributed to the water rate structure adopted during the Drought and the promotion of the City of Concord as a "Water Conservation Community," which the City advertises on its signage, websites and public information materials. Documentation of reduced water usage will be gathered in the next master planning process, which will occur during 2008, but already has been estimated at about 10 percent since the 2000-2002 period.

12. Concord has been commended by State officials as having one of the most aggressive water conservation programs and water rate structures in North Carolina. Subsequent to the Drought, the combination of these measures has reduced irrigation and other consumptive water uses, which typically represent 50 to 75 percent of the peak day demand.

Hiatt Declaration, Aug. 3, 2007

13. Concord aggressively enforced its ordinances restricting water use during the Drought. Concord issued fines totaling $72,600 during the Drought, which made the headlines of *USA Today* and were described by State officials as the most significant water use enforcement effort in North Carolina's history.

14. The City of Concord created a tiered rate structure that promotes water conservation and strongly discourages irrigation and excessive water use by making high levels of consumption more expensive. The rate structure, with its economic disincentives to excessive water use, complements the City's conservation programs.

15. For water customers both inside and outside of the Concord city limits, the first rate tier volume charge threshold is consumption of 7,500 gallons per month, and the charge per additional 1,000 gallons used per month increases by over two dollars per gallon (from $4.72 per 1000 gallons to $6.84 per 1000 gallons for city residents or from $5.66 per 1000 gallons to $8.21 per 1000 gallons for nonresidents). Concord adopted this rate structure during the Drought and has kept the rate structure in place since the Drought.

Hiatt Declaration, Aug. 3, 2007

16. Typically for a water supply system, irrigation and other consumptive uses such as cooling waters can represent 50 to 75 percent of the peak day demand and 20 to 25 percent of average annual consumptive water use. After Concord implemented conservation measures and the new rate structure, irrigation use has become only a small percentage of the average water use. Similarly, water demands have not returned to previous levels because the rate structure discourages water use.

17. The water management ordinances enacted by Concord promote efficient water use at all times, not just during drought conditions, by requiring water-sensitive systems that turn off when adequate rainfall occurs, and have leak prevention measures, among a number of other requirements. Additionally, these conservation measures apply to all service areas of the City, including other communities within Cabarrus County that receive water from Concord.

18. Concord also has enacted a Water Emergency Management Ordinance. Concord's ordinance was updated in March 2003 to address future connection and extension of its water system. The ordinance establishes four drought stages, ranging from Level I (the least severe) to Level IV (the most severe), and sets out the restrictions to be

implemented under each level, together with enforcement measures. For example, at Drought Level III, large scale commercial and industrial water customers using 5,000 gallons or more daily must undergo mandatory reductions of 25, 50 or 75 percent, depending upon the severity of the emergency. At Drought Level IV, all water use other than for maintenance of public safety is prohibited, and residential usage is limited to 300 gallons daily per metered location.

19. The available water supply in the Rocky River sub-basin is insufficient to meet projected needs. Concord has a limited watershed for water supply development. Potential reservoir sites in the watershed have already been developed, and Concord already has more reservoir storage than it has watershed yield to supply it. Based on the safe yield of existing supplies, a shortage of approximately 18.32 million gallons per day ("MGD") is projected by 2035 for Concord and Kannapolis combined. In spite of the aggressive conservation measures enacted by Concord, without the 10 MGD interbasin transfer from the Catawba River basin recently approved by the North Carolina Environmental Management Commission, Concord will face severe future water supply shortages not only in times of drought, but in periods of normal rainfall.

Hiatt Declaration, Aug. 3, 2007

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 3rd day of August, 2007.

/s/ W. Brian Hiatt
W. Brian Hiatt

No. 138, Original

In the

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Complaint

DECLARATION OF MIKE LEGG

I, Mike Legg, do hereby declare, certify, and state that:

1. I am the City Manager of Kannapolis, North Carolina. I have served as City Manager since September 30, 2004, and as Assistant City Manager since 2001. I have also twice held the position of Interim City Manager since 2001.

2. I hold a degree in Geography and Urban and Regional Planning from the University of North Carolina at Charlotte.

Legg Declaration, Aug. 2, 2007

3. Combined, the Kannapolis and Concord water systems provide almost 100 percent of the public water supply in Cabarrus County, North Carolina. Kannapolis and Concord share the same watershed, the upper reaches of the Rocky River sub-basin. This watershed is relatively small.

4. The drought that occurred in central and western North Carolina and South Carolina beginning in 1998 and continuing into 2002 (the "Drought") significantly impacted communities such as Kannapolis and Concord in Cabarrus County, North Carolina. The Drought impacted Cabarrus County communities for a longer period of time than elsewhere, into 2003, because of the small size of their drinking water watersheds, all of which are in the upper portion of the Rocky River sub-basin.

5. The City of Kannapolis became aware of the impact of the Drought as early as 1998. Initial efforts to develop agreements for water supply with Concord and other neighboring communities began at that time.

6. Kannapolis cooperated closely with the City of Concord during the Drought regarding use of water resources. The two cities developed very similar ordinances to restrict water use and conserve water.

Legg Declaration, Aug. 2, 2007

7. Kannapolis discourages excessive water use with its rate structure, and implemented its water conservation ordinance during the Drought to further limit water use. Mandatory water use restrictions were in place for nearly three years, from September 11, 2000 through February 24, 2003. Irrigation was not allowed for over a year, from July 30, 2002 through June 4, 2003. Subsequently, irrigation was allowed only during the hours between 6:00 p.m. and 6:00 a.m. because irrigating during the day facilitates wasteful evaporation.

8. Kannapolis also had a heavy advertising campaign to reach its water users during the Drought, including mailers and newspaper advertisements that outlined the conditions of the drought and, depending on drought stage, the voluntary and/or mandatory water use measures for households to implement.

9. When Governor Michael F. Easley called for a 20 percent reduction in water use throughout North Carolina during the summer of 2002, Kannapolis had already achieved a reduction in water use of nearly 30 percent, even though this resulted in substantial losses in the city's water and wastewater revenue.

10. Because this watershed is small, it took many months of above average precipitation to

effectively end the Drought and replenish water supplies. Although the drought conditions ended in much of North Carolina and South Carolina in October/November 2002, water restrictions remained in place for Kannapolis until the fall of 2003.

11. After the Drought, water use in the Kannapolis system has changed even for non-drought periods. Per capita use has declined from when it was previously evaluated during the water and wastewater master planning process conducted from 2000 through 2002. This decline is attributed in part to the water rate structure. Documentation of reduced water usage will be gathered in the next master planning process, which will occur during 2008, but already has been estimated at about 10 percent since the 2000-2002 period.

12. Kannapolis has been commended by State officials as having one of the most aggressive water conservation programs and water rate structures in North Carolina. Subsequent to the Drought, the combination of these measures has reduced irrigation and other consumptive water uses, which typically represent 50 to 75 percent of the peak day demand. In addition, Kannapolis aggressively enforced its ordinances restricting water use during the Drought. Concord and Kannapolis were recognized for their

Legg Declaration, Aug. 2, 2007

water conservation programs and drought planning. Kannapolis aggressively enforced their ordinances and issued citations through the Kannapolis Police Department, Codes Enforcement and Public Works staff.

13. The City of Kannapolis uses a flat rate structure; however, the rates themselves promote efficient water use. Kannapolis charges a base rate in addition to a "per 1,000 gallon" rate that is higher than normal to discourage excessive water use. For water customers inside the Kannapolis city limits, the base charge is $3.30 and the volume charge for all volumes is $5.40/1,000 gallons. For customers outside the city limits, the base charge is $3.96 and the volume charge for all volumes is $6.48/1,000 gallons.

14. Typically for a water supply system, irrigation and other consumptive uses such as cooling waters can represent 50 to 75 percent of the peak day demand and 20 to 25 percent of average annual consumptive water use. After Kannapolis implemented conservation measures and the new rate structure, irrigation and other consumptive uses have been reduced. Irrigation use has become only a small percentage of the average water use. Similarly, other water demands have not returned to previous levels because the rate structure discourages water use.

Legg Declaration, Aug. 2, 2007

15. Kannapolis is in the process of adopting an ordinance similar to that already in place in Concord, to require water-sensitive systems that turn off when adequate rainfall occurs, and have leak prevention measures. These conservation measures will apply to all service areas of the City, including other communities within Cabarrus County that receive water from Kannapolis.

16. Kannapolis also has enacted a Water Emergency Management Ordinance, which has been in effect since March 2001. The ordinance addresses future connection and extension of its water system. The ordinance establishes four drought stages, ranging from Level I (the least severe) to Level IV (the most severe), and sets out the restrictions to be implemented under each level, together with enforcement measures. For example, at Drought Level III, large scale commercial and industrial water customers using 5,000 gallons or more daily must undergo mandatory reductions of 25, 50 or 75 percent, depending upon the severity of the emergency. At Drought Level IV, all water use other than for maintenance of public safety is prohibited, and residential usage is limited to 300 gallons daily per metered location.

Legg Declaration, Aug. 2, 2007

17. The available water supply in the Rocky River sub-basin is insufficient to meet projected needs. Kannapolis has a limited watershed for water supply development. Potential reservoir sites in the watershed have already been developed, and Kannapolis already has more reservoir storage than it has watershed yield to supply it. Based on the safe yield of existing supplies, a shortage of approximately 18.32 million gallons per day ("MGD") is projected by 2035 for Kannapolis and Concord combined. In spite of the aggressive conservation measures enacted by Kannapolis, without the 10 MGD interbasin transfer from the Catawba River basin recently approved by the North Carolina Environmental Management Commission, Kannapolis will face severe future water supply shortages not only in times of drought, but in periods of normal rainfall.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Legg Declaration, Aug. 2, 2007

Executed on this 2nd day of August, 2007.

/s/ Mike Legg
Mike Legg

No. 138, Original

In the

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Complaint

DECLARATION OF JOHN N. MORRIS

I, John N. Morris, do hereby declare, certify, and state that:

1. I am the Director for the Division of Water Resources of the North Carolina Department of Environment and Natural Resources ("DENR"). I have served as Director of DWR since 1980 (including predecessor entities).

2. Prior to coming to the Department of Environment and Natural Resources in 1977, I served as a Senior Planning Analyst with the State Planning

Morris Declaration, Aug. 1, 2007

Division of the North Carolina Department of Administration, and in this position I was responsible for natural resources and agriculture programs.

3. I have also served as a board member and chairman of the Interstate Council on Water Policy, an organization of state water management agencies, and as board member and chairman of the North Carolina Water Resources Association.

4. The Division of Water Resources ("the Division" or "DWR") is North Carolina's governmental agency primarily charged with monitoring and managing the State's water resources. The Division is responsible for water supply planning, water supply technical assistance to local governments, river basin planning, special studies of regional water supply and water management problems, and instream flow studies. The Division administers state water allocation laws related to capacity use areas and to interbasin transfers. The Division provides planning and financial assistance to local governments for navigation, flood control, water-based recreation, aquatic weed control, and beach protection projects and represents the State of North Carolina in partnerships with local governments and the U.S. Army Corps of Engineers to build these projects. N.C.

Morris Declaration, Aug. 1, 2007

Gen. Stat. Chapter 143, Article 2 and 2A and Article 38.

5. The Division serves as staff to the North Carolina Environmental Management Commission ("EMC"), and the Division's River Basin Management Section receives all petitions for interbasin transfers filed pursuant to N.C. Gen. Stat. § 143-215.22I.

6. I personally oversee the work of the Division, including its four operational sections. I directly supervise Tom Fransen, Head of the River Basin Management Section, who is responsible for managing State programs assigned to the Division related to the State's reservoirs and river basins.

7. The Catawba River begins in McDowell County, North Carolina and flows easterly, then southerly through the Catawba-Wateree Hydroelectric Project (Project No. 2232), a series of man-made impoundments that are managed under a single hydropower license issued by the Federal Energy Regulatory Commission ("FERC"). The Catawba River flows through Alexander, Avery, Burke, Caldwell, Catawba, Gaston, Iredell, Lincoln, McDowell and Mecklenburg Counties in North Carolina.

Morris Declaration, Aug. 1, 2007

8. With regard to the Catawba River, Duke Energy Carolinas, LLC ("Duke Energy") owns and operates 11 hydroelectric dams in the Catawba-Wateree Project that regulate the flow of water on the Catawba. Duke Energy's reservoirs on the Catawba are: Lake James; Lake Rhodhiss; Lake Hickory; Lookout Shoals Lake; Lake Norman; Mountain Island Lake; Lake Wylie (which straddles the North Carolina-South Carolina state line); and in South Carolina, Fishing Creek Lake; Great Falls Lake; Rocky Creek Lake; and Lake Wateree.

9. Duke Energy is currently undergoing relicensing for the Catawba-Wateree Project, and both North Carolina agencies and South Carolina agencies have participated in this process. Several of the Division staff, including Tom Fransen and Steve Reed, have participated in these proceedings on behalf of DWR.

10. From 1998 through 2002 North Carolina and South Carolina suffered a long-term drought. Significant impacts of this drought in North Carolina's portion of the Catawba River basin included:

a. decreased rates of hydroelectric power generation and resulting economic losses;
b. lowered reservoir levels, as a result of diminished rainfall and the need for Duke

Morris Declaration, Aug. 1, 2007

Energy to release water in an attempt to maintain river flow levels;

c. depleted public water supplies;
d. algal blooms that affected the taste and smell of drinking water; and
e. decreased opportunities for boating and other recreation.

11. The period of drought experienced by both North Carolina and South Carolina beginning in 1998 became extreme in 2002, and greatly stressed the water resources of the Catawba River Basin. As a result of this drought, the existing FERC license for the Catawba-Wateree Project was shown to be inadequate to meet reservoir level and water flow needs under extreme drought conditions. The proposed new licensing conditions in the Comprehensive Relicensing Agreement ("CRA") filed by Duke Energy with FERC in December 2006 contain operating rules that will maintain higher lake levels and allow higher flows into South Carolina if future drought conditions occur.

12. I am familiar with Donna Lisenby's assertion that "[a]lgae blooms occurred on Lake Wateree in the State of South Carolina that caused such taste and odor problems in finished drinking water for the City of Camden, South Carolina that residents stopped

Morris Declaration, Aug. 1, 2007

drinking tap water and started buying bottled water." (Motion for Leave to File Bill of Comp., ("Compl. Mot."), App., 38) Based on my knowledge of the drought-related, water shortage issues during this time period, it appears that North Carolina had problems of a similar nature to Camden's, but that North Carolina's problems were more widespread and existed to a greater degree.

13. I am aware that as a result of drought conditions in 2001 and 2002, DENR's Division of Water Quality, Environmental Sciences Branch conducted special studies on Lake Rodhiss and Lake Hickory. Lake Rodhiss, which supplies water for the towns of Valdese, Granite Falls, and Lenoir, suffered an algal bloom that began in 2001 and continued into 2002, resulting in taste and odor complaints from water users. Lake Hickory, which supplies water for the City of Hickory, suffered an algal bloom in 2002, resulting in taste and odor complaints from its water users.

14. During my 27 years working with public water supply systems in my position as the Director of the Division of Water Resources, it has been my experience that it is not uncommon for water systems to suffer taste and odor problems during droughts, and this is not a health or safety issue. During a drought, the

residence time for water in a reservoir increases, providing more time for the water to grow algae. Hot, still weather adds to the problem. Treatment plants vary in their capacity to remove algae; therefore, some of the "musty" or "vegetative" taste and odor of the algae may remain in the water when it is distributed. Some water systems experience this situation even under non-drought, or normal flow, conditions during the summer when conditions for algae growth are optimal.

15. A much more dire consequence of the drought for North Carolina occurred in the town of Cherryville, Gaston County, North Carolina in the South Fork Catawba subbasin of the Catawba River Basin, about 30 miles northwest of Charlotte, North Carolina. In mid-August 2002, the town suffered a water shortage and was required to use an emergency pump on a flatbed trailer (provided by North Carolina's Division of Emergency Management) to pump water from a hydrant on the Lincoln County water system into a hydrant on the Cherryville water system. Then when the Lincoln County system lost pressure and had to discontinue pumping, Cherryville faced the prospect of exhausting its emergency reservoir in four or five days thereby depleting the water supply for its population of 5,400. Fortunately, the town did not have to truck in water for its population, but in late-August 2002 as

the drought continued to worsen, Indian Creek, a major source of water for Cherryville, reached a flow level of one percent of its normal flow. At that time a member of DENR's staff worked with town officials to determine that an emergency well should be drilled and the height of the town's low-water dam on Indian Creek should be increased in order to provide adequate water supply for town residents.

16. As a result of North Carolina's experience with the drought that occurred from 1998 through 2002, the North Carolina General Assembly, in 2002, directed the EMC to adopt rules to "govern[] water conservation and water reuse during drought and water emergency situations." 2002 N.C. Sess. Laws 167, § 3(a).

17. After an extended stakeholder process, the EMC adopted regulations to govern water usage during periods of drought. These regulations, found at 15A North Carolina Admin. Code 2E .0601, *et seq.*, set standards for water conservation during droughts in the Catawba River basin and statewide.

18. The General Assembly has also created the Drought Management Advisory Council ("Council" or "DMAC"). 2003 N.C. Sess. Laws 387, § 2, codified at N.C. Gen. Stat. § 143-355.1. The DMAC is authorized to issue drought advisories defining the extent and

severity of drought in North Carolina as a guide to help water users adopt effective drought management policies. The Division provides staff support for the Council.

19. North Carolina by statute actively manages use of its river and lake resources and has consulted with South Carolina, as appropriate, about such use. North Carolina manages its water resources by a combination of planning, registration of water users, permitting and regulation.

20. North Carolina requires all units of local government that provide or plan to provide public water service, to prepare a Local Water Supply Plan and to update that plan at least every five years. In addition, all community water systems that regularly serve 1,000 or more service connections or serve more than 3,000 people are required to prepare a Local Water Supply Plan. N.C. Gen Stat. § 143-355(l). The Division uses these Local Water Supply Plans to create and update the North Carolina Water Supply Plan. Most recently the State has begun developing water supply plans for each river basin, which will be used to assure a sustainable, long-range basis for water use planning in each basin and to inform State regulatory decisions related to water resource management.

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21. North Carolina requires that "[a]ny person who withdraws 100,000 gallons per day or more of water from the surface or groundwaters of the State or who transfers 100,000 gallons per day or more of water from one river basin to another shall register the withdrawal or transfer with the Commission," and the registration must be updated at five-year intervals following the initial registration. N.C. Gen. Stat. § 143-215.22H(a) and (d). The threshold for registering agricultural uses is 1,000,000 gallons per day. N.C. Gen. Stat. § 143-215.22H(b1).

22. The Division's records indicate that as of July 30, 2007 there are 24 public water supply systems, 27 non-agricultural users, and 4 agricultural users withdrawing water from the Catawba River basin (these numbers include not only water users required to register per N.C. Gen. Stat. § 143-215.22H, but also those water users registering any amount of withdrawal, however small, and include both groundwater and surface water withdrawals).

23. North Carolina requires any person to secure a certificate from the EMC before (a) transferring 2,000,000 gallons of water or more per day from one river basin to another or (b) increasing the amount of an existing transfer above the amount approved by the EMC in a certificate issued prior to July 1, 1993,

except where a facility to transfer water from one basin to another was existing or under construction on July 1, 1993 and the transfer would be within the "full capacity" of that existing facility (i.e., except where the facility is "grandfathered"). The General Assembly also authorized existing surface water transfers for which environmental review pursuant to the North Carolina Environmental Policy Act, N.C. Gen Stat. § 113A-1, *et seq.* ("NCEPA") had been completed 1993 N.C. Sess. Laws 384, § 7. Surface Water Transfer Law, N.C. Gen. Stat. § 143-215.22I, *et seq.* (also known as the "Interbasin Transfer Statute").

24. Pursuant to the Interbasin Transfer Statute, the State of North Carolina has authorized the following transfers from the Catawba River Basin:

a. Charlotte-Mecklenburg – 33 million gallons per day ("mgd") maximum daily transfer to the Rocky River basin.
b. Concord and Kannapolis – 10 mgd maximum daily transfer to the Rocky River basin.

25. The Division's records indicate that as of July 30, 2007 the following are users reported transfers from the Catawba River basin to another River basin, but were not required to obtain a certificate from the EMC:

a. Lenoir to Yadkin River basin <0.1 mgd

b. Cherryville to Broad River basin <0.1 mgd

26. As discussed above, the Interbasin Transfer Statute authorized certain existing facilities or those for which environmental review had been completed. The Division's records indicate that there are three "grandfathered" transfers from the Catawba River basin:

a. Mooresville –9.54 mgd maximum daily transfer to the Rocky River/South Yadkin River basin.
b. Union County – 5 mgd maximum daily transfer to the Rocky River basin.
c. Statesville – 15 mgd maximum daily transfer to the South Yadkin basin.

27. Interbasin transfers reduce the flow of the Catawba River by a small percentage when compared with other consumptive water uses. Projected to 2038 by the water supply study prepared, as part of the CRA, for Duke Energy by HDR Engineering, Inc. of the Carolinas ("Duke Energy Water Supply Study"), the largest consumptive water uses within the Catawba River basin, in order of magnitude of water consumption, are: (a) thermal power plant cooling (5.2%), (b) the consumptive use portion of normal municipal water use within the Catawba River basin (excluding transfers) (4.5%), (c) interbasin transfers (2%), and (d) agricultural irrigation (1.7%).

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28. The Interbasin Transfer Statute mandates a rigorous process that takes a significant amount of time, effort, and expense on the part of the applicant, the Division (as staff to the EMC), and the EMC. Upon filing a petition requesting a certificate authorizing an interbasin transfer, N.C. Gen. Stat. § 143-215.22I requires (a) a detailed proposal (including water conservation measures to be employed); (b) an analysis of the environmental impacts of the proposed transfer that meets the requirements of NCEPA; (c) public notice and hearing and opportunity to submit written comments; and (d) a determination that the benefits of the proposed transfer outweigh the detriments and that the detriments will be mitigated to a reasonable degree. For example, Concord and Kannapolis submitted the petition for an interbasin and Draft Environmental Impact Statement (EIS) in November 2004, the EMC authorized proceeding to public comment and public hearing in December 2004, a Final EIS was issued in May 2006, a Revised Final EIS was issued in November 2006, and the EMC approved an interbasin transfer and issued the interbasin transfer certificate in January 2007 – the decision-making process exceeded two years.

29. The extent of stakeholder involvement in interbasin transfer decision making is typified by the

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Concord-Kannapolis interbasin transfer certification process. During the comment period on the Concord-Kannapolis interbasin transfer petition and Environmental Impact Statement, over 290 oral comments were received over the course of two public hearings and two additional public meetings, and over 1,600 written comments were received. Public hearing attendees included citizens of South Carolina and public comments were received not only from citizens of South Carolina, but also South Carolina governmental entities, such as Kershaw County (where Camden, South Carolina is located) and industries, such as Bowater.

30. These water resource planning efforts within North Carolina, along with permitting and regulation, benefit and protect downstream users of water from the 17 major river basins in North Carolina, including South Carolina.

31. DWR's website contains information regarding all approved interbasin transfers of 2,000,000 million gallons of water or more per day and lists registered water users, those who withdraw 100,000 gallons or more per day from surface or groundwater or who transfer 100,000 gallons or more from one river basin to another and are not exempted by N.C. Gen. Stat. 143-215.22H, for the years of 1999, 2004, 2005, 2006.

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This information is available to the public in general, including South Carolina, at www.ncwater.org.

32. During the Duke Energy Water Supply Study, the Division provided all of its information about present and projected water withdrawals in the North Carolina portion of the Catawba River basin, including interbasin transfers, to the Duke study team and to their consultant. This information was incorporated into their water supply study and was available to South Carolina government agencies and to other interested parties.

33. As indicated in items 31 and 32, the Division has made information on water use in North Carolina freely available to South Carolina. I have no knowledge of any request by South Carolina to DWR for information regarding water withdrawals or interbasin transfers nor has my staff informed me of any such requests.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 1, 2007.

/s/ John N. Morris
John N. Morris

No. 138, Original

In the

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Complaint

DECLARATION OF STEVEN REED

I, Steven Reed, do hereby declare, certify, and state that:

1. I received a Bachelor of Arts degree in Zoology from the University of North Carolina at Chapel Hill in 1972. I received a Master of Science degree from East Carolina University in Aquatic Ecology in 1979.

2. I began working for the predecessor agency to the North Carolina Department of Environment and Natural Resources ("DENR") on January 1, 1976 and have been employed at DENR or its predecessor

agencies since that time. I am presently employed by DENR's Division of Water Resources ("DWR") and hold the position of Environmental Supervisor. I also serve as the Aquatic Ecology Team Leader as well as the Hydropower Licensing Coordinator.

3. DWR has been assigned to be the lead division within DENR regarding DENR's participation in the "relicensing" of hydropower projects in North Carolina that are licensed by the Federal Energy Regulatory Commission ("FERC"). "Relicensing" describes the process that is initiated prior to the expiration of an existing license for a hydropower project and that is intended to result in a new license for operation of the project.

4. I am responsible for coordinating DENR's participation in the relicensing of Alcoa Power Generating Inc.'s ("APGI") Yadkin Hydroelectric Project (FERC Proj. No. 2197) and several projects operated by Duke Energy Corp.-Nantahala Area ("DPNA") (FERC Proj. Nos. 2601, 2602, 2603, 2619, 2686, 2692 and 2698). I have also coordinated for DENR the now-completed relicensing of APGI's Tapoco Project (FERC Proj. No. 2169) and DPNA's Queens Creek Project (FERC Proj. No. 2694).

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5. I am primarily responsible for coordinating DENR's participation in the relicensing of Duke Energy Carolinas LLC's ("Duke") Catawba-Wateree Hydro Project ("Catawba Project"), which has been assigned docket number P-2232 by FERC. The Catawba Project includes 11 dams -- 6 in North Carolina and 5 in South Carolina -- on the Catawba River. It is one of the largest projects currently under FERC license. The license for this project expires in August 2008.

6. I was integrally involved in the Catawba Project relicensing process. I personally participated in at least a hundred meetings and conference calls over a four-year period. I also participated in many days of field work and technical analysis and was directly involved in the drafting of settlement provisions and proposed license articles within my areas of experience and expertise.

7. The relicensing process for the Catawba Project began in earnest in February 2003 when Duke filed with FERC its First Stage Consultation Document. Duke filed with FERC a Notice of Intent to Relicense in July 2003.

8. Early in the process, the interested parties were organized into several Stakeholder Teams. Eighty

different parties were represented, including federal, State, Tribal, and local government, and various advocacy and interest groups. Several resource committees and ad hoc committees were also formed to carry out technical analyses and field studies, develop alterative operating scenarios, analyze these alternatives, and build consensus. One committee was specifically devoted to overseeing the Computer Hydro-Electric Operations and Planning Software ("CHEOPS") hydrologic model. Other committees addressed, for example, consumptive water uses, water quality, and downstream flow issues.

9. Representatives from South Carolina resources agencies were invited to participate on all committees conducting work relevant to water use and water quality. These committees addressed, for example, the use of CHEOPS to evaluate operating scenarios, minimum flow proposals (including the proposed 1,100 cubic feet per second ("cfs") minimum flow from Lake Wylie), planning for consumptive uses of Catawba River water throughout the term of the new license (including interbasin transfers), and drought management (particularly the Low Inflow Protocol ("LIP")).

10. The process for crafting a consensus operating scenario involves the balancing of various

water uses, which include instream uses (releases for power generation, releases to maintain fish habitat and to support fish spawning, releases for recreational uses such as canoeing, releases to maintain flows necessary for wastewater assimilation, etc.) and offstream uses (drinking water, industrial process water, cooling water for thermal power generation, etc.). To accomplish this, the Catawba relicensing participants used a rigorous iterative process involving the linking of multiple models that is more sophisticated than any analogous process used in any other relicensing in North Carolina.

11. The stakeholder process resulted in the Comprehensive Relicensing Agreement for the Catawba-Wateree Hydro Project FERC Project No. 2232 ("CRA"). The CRA is a good faith, balanced compromise of the signatories' positions and needs and is based on sound data and analysis.

12. The CRA includes proposed license articles that the signatories have requested FERC include in the new license for the Catawba Project. One proposed license article would require a 1,100 cfs minimum flow (measured instantaneously) from the Lake Wylie dam in South Carolina, except during drought. As with the overall CRA, the flow requirements, including requirements for flows from Lake Wylie dam, were the

result of good faith negotiation and a compromise of many interests based on sound science. The current license requires a minimum release from the Lake Wylie dam of 411 cfs (measured as a daily average).

13. The parties have also agreed that each party that withdraws water from the Catawba River would be subject to the LIP, relevant excerpts of which are attached to this declaration at Attachment A. The LIP provides a staged response to worsening droughts. In general, at each stage the flow requirements (including those regarding Lake Wylie flows) would be reduced in order to preserve in-reservoir supplies; water users would be required to implement stricter demand control measures in order to reduce their need for water. However, the LIP would not reduce the amount of water each party (except Duke) is permitted to use. The parties have requested that FERC impose the LIP on Duke as a condition of the new license.

14. One proposed license article would require Duke to provide minimum instream flows to meet the specific needs of several named major industrial users (Celanese Acetate, Nations Ford Chemical, South Carolina Electric & Gas Company, International Paper, and the Bowater Pulp and Paper Mill) and municipal water users (Union/Lancaster Catawba River Water Treatment Plant and Rock Hill Municipal

back-up water supply intake) in South Carolina. The proposed article would permit temporary variances only during droughts. The proposed article provides similar, but fewer, minimum flow requirements for North Carolina users.

15. The parties to the CRA have requested that FERC issue a license with a term of no less than 40 years.

16. The CRA was executed by 70 parties in the summer of 2006. (The CRA was slightly revised in December 2006.)

17. The following South Carolina government entities signed the CRA: the South Carolina Department of Natural Resources; the South Carolina Department of Parks, Recreation, and Tourism; and the South Carolina Department of Archives and History. The South Carolina Department of Health and Environmental Control did not sign the CRA. It is my understanding that this was not related to any substantive disagreement regarding terms affecting water quantity, availability, or flow.

18. The following additional parties in South Carolina also signed the CRA: Bowater Incorporated; Chester Metropolitan District; City of Camden, South

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Carolina; City of Rock Hill, South Carolina; International Paper; Kershaw County, South Carolina; Kershaw County Conservation District; Lake Wateree Association; Lake Wylie Marine Commission; Lugoff-Elgin Water Authority; South Carolina Electric & Gas; South Carolina Wildlife Federation; Springs Global US, Inc.; Town of Great Falls, South Carolina; Wateree Homeowners Association - Fairfield County; York County, South Carolina; and York County Culture and Heritage Commission.

19. Duke filed with FERC its application for a new license and the CRA on August 29, 2006. The amended CRA was submitted to FERC on December 29, 2006.

20. Before issuing a license, FERC must comply with the National Environmental Policy Act. Under this responsibility, FERC has announced that it will produce an environmental impact statement ("EIS"). On February 28, 2007, FERC issued "Scoping Document 1," ("SD1") which begins the process of determining the breadth of environmental issues FERC must address. In SD1, FERC also announced

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that it plans to issue a draft EIS in November 2007 and a final EIS in April 2008. It is my understanding that FERC plans to issue an order granting a new license prior to August 2008 when the current license expires.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 2nd day of August, 2007.

/s/ Steven Reed
Steven Reed

ATTACHMENT A
of Declaration of Steven Reed

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Comprehensive Relicensing Agreement
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APPENDIX C: LOW INFLOW PROTOCOL (LIP) FOR THE CATAWBA-WATEREE PROJECT

[C - 1] PURPOSE

The purpose of this Low Inflow Protocol (LIP) is to establish procedures for reductions in water use during periods of low inflow to the Catawba-Wateree Project (the Project). The LIP was developed on the basis that all parties with interests in water quantity will share the responsibility to establish priorities and to conserve the limited water supply.

OVERVIEW

This Low Inflow Protocol provides trigger points and procedures for how the Catawba-Wateree Project will be operated by the Licensee, as well as water withdrawal reduction measures and goals for other water users during periods of low inflow (i.e., periods when there is not enough water flowing into the Project reservoirs to meet the normal water demands while maintaining Remaining Usable Storage in the reservoir system at or above a seasonal target level).

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The Licensee will provide flow from hydro generation and other means to support electric customer needs and the instream flow needs of the Project. During periods of normal inflow, reservoir levels will be maintained within prescribed Normal Operating Ranges. During times that inflow is not adequate to meet all of the normal demands for water and maintain reservoir levels as normally targeted the Licensee will progressively reduce hydro generation. If hydrologic conditions worsen until trigger points outlined herein are reached, the Licensee will declare a Stage 0 - Low Inflow Watch and begin meeting with the applicable agencies and water users to discuss this LIP. If hydrologic conditions continue to worsen, the Licensee will declare various stages of a Low Inflow Condition (LIC) as defined in the Procedure section of this document. Each progressive stage of the LIC will call for greater reductions in hydro station releases and water withdrawals, and allow additional use of the available water storage inventory.

The goal of this staged LIP is to take the actions needed in the Catawba-Wateree River Basin to delay the point at which the Project's usable water storage inventory is fully depleted. While there are no human actions that can guarantee that the Catawba-Wateree

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River Basin will never experience operability limitations at water intake structures due to low reservoir levels or low streamflows, this LIP is intended to provide additional time to allow precipitation to restore streamflow, reservoir levels, and groundwater levels to normal ranges. The amount of additional time that is gained during the LIP depends primarily on the diagnostic accuracy of the trigger points, the amount of regulatory flexibility the Licensee has to operate the Project, and the effectiveness of the Licensee and other water users in working together to implement their required actions and achieve significant water use reductions in a timely manner.

To ensure continuous improvement regarding the LIP and its implementation throughout the term of the New License, the LIP will be re-evaluated and modified periodically. These re-evaluations and modifications will be as determined by the Catawba-Wateree Drought Management Advisory Group (CW-DMAG). **[C - 2]**

* * * *

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[C - 9]* * * * PROCEDURE

During periods of normal inflow, reservoir levels will be maintained within prescribed Normal Operating Ranges. During times that inflow is not adequate to meet all of the normal demands for water and maintain reservoir levels as normally targeted, the Licensee will progressively reduce hydro generation while meeting Project Flow Requirements. During a Low Inflow Watch or a Low Inflow Condition (LIC) (as defined below), the Licensee and other water users will follow the protocol set forth below for the Catawba-Wateree Project regarding communications and adjustments to hydro station flow releases, bypassed flow releases, minimum reservoir elevations, and other water demands. The adjustments set forth below will be made on a monthly basis and are designed to equitably allocate the impacts of reduced water availability in accordance with the purpose statement of this LIP.

Trigger points that demonstrate worsening hydrologic conditions will define various stages of the Low Inflow Condition. * * * *

* * * *

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[C - 10] Stage 0 Actions

The Licensee will monitor the Storage Index, the U.S. Drought Monitor, and the Monitored USGS Streamflow Gages on at least a monthly basis and will declare a Stage 0 Low Inflow Watch if any two of the following conditions occur:

a. On the first day of the month, Storage Index is below the Target Storage Index, but greater than 90% of the Target Storage Index, while providing the Project Flow Requirements for the previous month.

b. The U.S. Drought Monitor Three-Month Numeric Average has a value greater than or equal to 0.

c. The sum of the actual rolling six-month average streamflows at the Monitored USGS Streamflow Gages is equal to or less than 85% of the sum of the period of record rolling average streamflows for the same six-month period.

When a Low Inflow Watch has been declared:

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a. The Licensee will activate the CW-DMAG, including the initiation of monthly meetings or conference calls to occur on the second Tuesday of each month. These monthly discussions will focus on:
   - Proper communication channels between the CW-DMAG members.
   - Information reporting consistency for CW-DMAG members, including a storage index history and forecast (at least a 90-day look back and look ahead) from the Licensee, a water use history and forecast (at least a 90-day look back and look ahead) from each water user on the CW-DMAG, streamflow gage and groundwater monitoring status from the state agencies and USGS, and state-wide drought response status from the state agencies.
   - Refresher training on this LIP.
   - Overview discussions from each CW-DMAG member concerning their role and plans for responding if a Stage 1 or higher Low Inflow Condition is subsequently declared.

- The Licensee will reduce the prescribed recreation flow releases at the Wylie Development from 6,000 cfs to 3,000 cfs.

Stage 1 Actions

1. The Licensee will declare a Stage 1 Low Inflow Condition (LIC) and notify the CW-DMAG if:

    a. On the first day of the month, the Storage Index is at or below 90% of the Target Storage Index, but greater than 75% of the Target Storage Index, while providing the Project Flow Requirements for the previous month.

    and either of the following conditions exists:

    b. The U.S. Drought Monitor Three-Month Numeric Average has a value greater than or equal to 1.

    c. The sum of the actual rolling six-month average streamflows at the Monitored USGS Streamflow Gages is equal to or less than 78% of the sum of the period of record

rolling average streamflows for the same six-month period. **[C - 11]**

2. The Licensee will complete the following activities within 5 days after the Stage 1 LIC declaration:

    a. Reduce the Project Flow Requirements by 60% of the difference between the normal Project Flow Requirements and the Critical Flows. These reduced Project Flow Requirements are referred to as Stage 1 Minimum Project Flows.

    b. Reduce the Normal Minimum Elevations by two feet at Lake James and Lake Norman and by one foot at each of the other Project reservoirs, but not to levels at any reservoir below the applicable Critical Reservoir Elevation. These elevations are referred to as the Stage 1 Minimum Elevations.

    c. Update its Web site and Interactive Voice Response (IVR) messages to account for the impacts of the LIP on reservoir levels, usability of the Licensee's public access areas, and recreation flow schedules.

d. Notify the Federal Energy Regulatory Commission (FERC), the United States Fish and Wildlife Service (USFWS), the United States Bureau of Indian Affairs (USBIA), National Marine Fisheries Service (NMFS), and the Catawba Indian Nation of the Stage 1 LIC declaration.

e. Provide bi-weekly (once every two weeks) information updates to owners of Large Water Intakes about reservoir levels, meteorological forecasts, and inflow of water into the system.

f. In addition the Licensee may, at its sole discretion, modify or suspend its use of selected operating procedures that are designed for periods of normal or above normal inflow to optimize the water storage capabilities of the Project, including the Normal Maximum Elevations and Normal Target Elevations for reservoir levels; the Spring Reservoir Level Stabilization Program; the Wylie High Inflow Protocol and at Lake Wateree, the Spring Stable Flow Periods and Floodplain Inundation

Periods. These modifications and suspensions may be used at the Licensee's sole discretion in any Low Inflow Condition (Stages 1 through 4).

3. Owners of Public Water Supply intakes and owners of intakes used for irrigation with a capacity greater than 100,000 gallons per day will complete the following activities within 14 days after the Stage 1 LIC declaration:

    a. Notify their water customers and employees of the Low Inflow Condition through public outreach and communication efforts.

    b. Request that their water customers and employees implement voluntary water use restrictions, in accordance with their drought response plans, which may include:
        - Reduction of lawn and landscape irrigation to no more than two days per week (i.e. residential, multi-family, parks, streetscapes, schools, etc).
        - Reduction of residential vehicle washing.

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At this stage, the goal is to reduce water usage by 3-5% (or more) from the amount that would otherwise be expected. The baseline for this comparison will be generated by each entity and will be based on existing conditions (i.e. drought conditions). For the purposes of determining 'the amount that would **[C - 12]** otherwise be expected', each entity may give consideration to one or more of the following:

- Historical maximum daily, weekly, and monthly flows during drought conditions.
- Increased customer base (e.g. population growth, service area expansion) since the historical flow comparison.
- Changes in major water users (e.g. industrial shifts) since the historical flow comparison.
- Climatic conditions for the comparison period.
- Changes in water use since the historical flow comparison.
- Other system specific considerations.

c. Provide a status update to the CW-DMAG on actual water withdrawal trends. Discuss plans for moving to mandatory restrictions, if required.

4. Owners of Large Water Intakes, other than those referenced in item 3 above, will complete the following activities within 14 days after the Stage 1 LIC declaration:

a. Notify their customers and employees of the Low Inflow Condition through public outreach and communication efforts.

b. Request that their customers and employees conserve water through reduction of water use, electric power consumption, and other means.

c. Provide a status update to the CW-DMAG on actual water withdrawal trends.

Stage 2 Actions

1. The Licensee will declare a Stage 2 Low Inflow Condition (LIC) and notify the CW-DMAG if:

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...on the first day of the month, the Storage ...dex is at or below 75% of the Target ...rage Index, but greater than 57% of the ...rget Storage Index, while providing the ...ge 1 Minimum Project Flows during the ...ious month.

...the following conditions exists:

...U.S. Drought Monitor Three-Month ...ix Average has a value greater than ...l to 2.

...m of the actual rolling six-month ... streamflows at the Monitored ...eamflow Gages is equal to or less ...f the sum of the period of record ...rage streamflows for the same ... period.

...complete the following activities ...r the Stage 2 LIC declaration:

... prescribed recreation flow ... this stage and all subsequent ...duce the Project Flow

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Requirements by 95% of the difference between the normal Project Flow Requirements and Critical Flows. These reduced flows are referred to as Stage 2 Minimum Project Flows.

b. Reduce the Stage 1 Minimum Elevations by one additional foot at Lake James (three feet total below Normal Minimum Elevation) and two additional **[C - 13]** feet at Lake Norman (four feet total below Normal Minimum Elevation) and by one additional foot (two feet total below Normal Minimum Elevations) at each of the other Project reservoirs but not to levels at any reservoir below the applicable Critical Reservoir Elevation. These elevations are referred to as the Stage 2 Minimum Elevations.

c. Update its Web site and IVR messages to account for the impacts of the LIP on reservoir levels, usability of the Licensee's public access areas, and recreation flow schedules.

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d. Notify the FERC, the USFWS, the USBIA, NMFS, and the Catawba Indian Nation of the Stage 2 LIC declaration.

e. Provide bi-weekly information updates to owners of Large Water Intakes about reservoir levels, meteorological forecasts, and inflow of water into the system.

f. In addition the Licensee may, at its sole discretion, modify or suspend its use of selected operating procedures that are designed for periods of normal or above normal inflow to optimize the water storage capabilities of the Project, including the Normal Maximum Elevations and Normal Target Elevations for reservoir levels; the Spring Reservoir Level Stabilization Program; the Wylie High Inflow Protocol; and at Lake Wateree, the Spring Stable Flow Periods and Floodplain Inundation Periods. These modifications and suspensions may be used at the Licensee's sole discretion in any Low Inflow Condition (Stages 1 through 4).

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3. Owners of Public Water Supply intakes and owners of intakes used for irrigation with a capacity greater than 100,000 gallons per day will complete the following activities within 14 days after the Stage 2 LIC declaration:

    a. Notify their water customers and employees of the continued Low Inflow Condition and movement to mandatory water use restrictions through public outreach and communication efforts.

    b. Require that their water customers and employees implement mandatory water use restrictions, in accordance with their drought response plans, which may include:
        - Limiting lawn and landscape irrigation to no more than two days per week (i.e. residential, multi-family, parks, streetscapes, schools, etc).
        - Eliminating residential vehicle washing.
        - Limiting public building, sidewalk, and street washing activities except as required for safety and/or to maintain regulatory compliance.

At this stage, the goal is to reduce water usage by 5-10% (or more) from the amount that would otherwise be expected (as discussed in Stage 1 above).

c. Enforce mandatory water use restrictions through the assessment of penalties.

d. Provide a status update to the CW-DMAG on actual water withdrawal trends.

4. Owners of Large Water Intakes, other than those referenced in item 3 above, will complete the following activities within 14 days after the Stage 2 LIC declaration: **[C - 14]**

a. Continue informing their customers and employees of the Low Inflow Condition through public outreach and communication efforts.

b. Request that their customers and employees conserve water through reduction of water use, electric power consumption, and other means.

c. Provide a status update to the CW-DMAG on actual water withdrawal trends.

Stage 3 Actions

1. The Licensee will declare a Stage 3 Low Inflow Condition (LIC) and notify the CW-DMAG if:

   a. On the first day of the month, the Storage Index is at or below 57% of the Target Storage Index, but greater than 42% of the Target Storage Index, while providing the Stage 2 Minimum Project Flows during the previous month.

   and either of the following conditions exists:

   b. The U.S. Drought Monitor Three-Month Numeric Average has a value greater than or equal to 3.

   c. The sum of the actual rolling six-month average streamflows at the Monitored USGS Streamflow Gages is equal to or less than 55% of the sum of the period of record

rolling average streamflows for the same six-month period.

2. The Licensee will complete the following activities within 5 days after the Stage 3 LIC declaration:

   a. Reduce the Project Flow Requirements to Critical Flows. These reduced flows are referred to as Stage 3 Minimum Project Flows.

   b. Reduce the Stage 2 Minimum Elevations by seven additional feet at Lake James (ten feet total below Normal Minimum Elevation) and one additional foot at Lake Norman (five feet total below Normal Minimum Elevation) and by one additional foot (three feet total below Normal Minimum Elevations) at each of the other Project reservoirs but not to levels at any reservoir below the applicable Critical Reservoir Elevation. These elevations are referred to as the Stage 3 Minimum Elevations.

c. Update its Web site and IVR messages to account for the impacts of the LIP on reservoir levels, usability of the Licensee's public access areas, and recreation flow schedules.

d. Notify the FERC, the USFWS, the USBIA, NMFS, and the Catawba Indian Nation of the Stage 3 LIC declaration.

e. Provide bi-weekly information updates to owners of Large Water Intakes about reservoir levels, meteorological forecasts, and inflow of water into the system.

f. In addition the Licensee may, at its sole discretion, modify or suspend its use of selected operating procedures that are designed for periods of normal or above normal inflow to optimize the water storage capabilities of the Project, including the Normal Maximum Elevations and Normal Target Elevations for reservoir levels; the Spring Reservoir Level Stabilization Program; the Wylie High Inflow Protocol; and at Lake Wateree, the Spring Stable

Flow Periods [C - 15] and Floodplain Inundation Periods. These modifications and suspensions may be used at the Licensee's sole discretion in any Low Inflow Condition (Stages 1 through 4).

3. Owners of Public Water Supply intakes and owners of intakes used for irrigation with a capacity greater than 100,000 gallons per day will complete the following activities within 14 days after the Stage 3 LIC declaration:

   a. Notify their water customers and employees of the continued Low Inflow Condition and movement to more stringent mandatory water use restrictions through public outreach and communication efforts.

   b. Require that their water customers and employees implement increased mandatory water use restrictions, in accordance with their drought response plans, which may include:
      - Limiting lawn and landscape irrigation to no more than one day per week (i.e.

residential, multi-family, parks, streetscapes, schools, etc).

- Eliminating residential vehicle washing.
- Limiting public building, sidewalk, and street washing activities except as required for safety and/or to maintain regulatory compliance.
- Limiting construction uses of water such as dust control.
- Limiting flushing and hydrant testing programs, except to maintain water quality or other special circumstances.
- Eliminating the filling of new swimming pools.

At this stage, the goal is to reduce water usage by 10-20% (or more) from the amount that would otherwise be expected (as discussed in Stage 1 above).

c. Enforce mandatory water use restrictions through the assessment of penalties.

d. Encourage industrial/manufacturing process changes that reduce water consumption.

e. Provide a status update to the CW-DMAG on actual water withdrawal trends.

4. Owners of Large Water Intakes, other than those referenced in item 3 above, will complete the following activities within 14 days after the Stage 3 LIC declaration:

a. Continue informing their customers and employees of the Low Inflow Condition through public outreach and communication efforts.

b. Request that their customers and employees conserve water through reduction of water use, electric power consumption, and other means.

c. Encourage industrial/manufacturing process changes that reduce water consumption.

d. Provide a status update to the CW-DMAG on actual water withdrawal trends.

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Stage 4 Actions

1. The Licensee will declare a Stage 4 Low Inflow Condition (LIC) and notify the CW-DMAG if: **[C - 16]**

    a. On the first day of the month, the Storage Index is at or below 42% of the Target Storage Index, while providing the Stage 3 Minimum Project Flows during the previous month.

    and either of the following conditions exists:

    b. The U.S. Drought Monitor Three-Month Numeric Average has a value of 4.

    c. The sum of the actual rolling six-month average streamflows at the Monitored USGS Streamflow Gages is equal to or less than 40% of the sum of the period of record rolling six-month average streamflows for the same six-month period.

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2. The Licensee will:

   a. Continue to provide Critical Flows as long as possible.

   b. Reduce the Stage 3 Minimum Elevations to the Critical Reservoir Elevations.

   c. Establish a meeting date and notify the CW-DMAG within 1 day following the Stage 4 LIC declaration.

   d. Notify the FERC, the USFWS, the USBIA, NMFS, and the Catawba Indian Nation of the Stage 4 LIC declaration.

   e. Continue to update its Web site and IVR messages to account for the impacts of the LIP on reservoir levels, usability of the Licensee's public access areas, and recreation flow schedules.

   f. Provide bi-weekly information updates to owners of Large Water Intakes about reservoir levels, meteorological forecasts, and inflow of water into the system.

Catawba-Wateree Project (FERC No. 2232)
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g. In addition the Licensee may, at its sole discretion, modify or suspend its use of selected operating procedures that are designed for periods of normal or above normal inflow to optimize the water storage capabilities of the Project, including the Normal Maximum Elevations and Normal Target Elevations for reservoir levels; the Spring Reservoir Level Stabilization Program; the Wylie High Inflow Protocol, and at Lake Wateree, the Spring Stable Flow Periods and Floodplain Inundation Periods. These modifications and suspensions may be used at the Licensee's sole discretion in any Low Inflow Condition (Stages 1 through 4).

Note: Once a Stage 4 LIC is declared, the Remaining Usable Storage in the reservoir system is small and can be fully depleted in a matter of weeks or months. Groundwater recharge may also contribute to declining reservoir levels. For these reasons in the Stage 4 LIC, the Licensee may not be able to ensure that flow releases from its hydro developments

will meet or exceed Critical Flows or that reservoir elevations will be greater than or equal to the Critical Reservoir Elevations. [emphasis in original]

3. Owners of Public Water Supply intakes and owners of intakes used for irrigation with a capacity greater than 100,000 gallons per day will complete the following activities within 14 days after the Stage 4 LIC declaration:

    a. Notify their water customers and employees of the continued Low Inflow Condition and movement to **emergency** water use restrictions through public outreach and communication efforts. **[C - 17]**

    b. Restrict all outdoor water use.

    c. Implement emergency water use restrictions in accordance with their drought response plans, including enforcement of these restrictions and assessment of penalties.

d. Prioritize and meet with their commercial and industrial large water customers to discuss strategies for water reduction measures including development of an activity schedule and contingency plans.

e. Prepare to implement emergency plans to respond to water outages.

At this level, the goal is to reduce water usage by 20-30% (or more) from the amount that would otherwise be expected (as discussed in Stage 1 above).

4. Owners of Large Water Intakes on the CW-DMAG, other than those referenced in item 3 above, will complete the following activities within 14 days after the Stage 4 LIC declaration:

a. Continue informing their customers and employees of the Low Inflow Condition through public outreach and communication efforts.

b. Request that their customers and employees conserve water through

reduction of water use, electric power consumption, and other means.

c. Encourage industrial/manufacturing process changes that reduce water consumption.

d. Provide a status update to the CW-DMAG on actual water withdrawal trends.

5. The CW-DMAG will:

a. Meet within 5 days after the declaration of the Stage 4 LIC and determine if there are any additional measures that can be implemented to:
   (1) reduce water withdrawals without creating more severe regional problems;
   (2) reduce water releases from the Project without creating more severe regional problems; or
   (3) use additional reservoir storage without creating more severe regional problems.

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b. Work together to develop plans and implement any additional measures identified above.

No. 06A1150

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STATE OF NORTH CAROLINA,

Respondent.

On Motion for Leave to File Bill of Complaint

RESPONSE OF THE STATE OF NORTH CAROLINA TO SOUTH CAROLINA'S APPLICATION FOR A PRELIMINARY INJUNCTION

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RESPONSE OF THE STATE OF NORTH CAROLINA TO SOUTH CAROLINA'S APPLICATION FOR A PRELIMINARY INJUNCTION

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

STATEMENT

On June 7, 2007, South Carolina filed a motion for leave to file a Bill of Complaint against North Carolina to have this Court equitably apportion the Catawba River. *See* Br. in Supp. of Mot. for Leave to File Bill of Compl., p. 14. At the same time, South Carolina also filed an application for a preliminary injunction. In the application, South Carolina asserts that the Catawba River is subject to "'inadequate water volume at ordinary stages.'" Application for Prelim. Inj., p. 2. [hereinafter "Application"] (quoting *Jones v. Duke Power Co.*, 501 F. Supp. 713, 717 (W.D.N.C. 1980), *aff'd mem.*, 672 F.2d 910 (4th Cir. 1981)).[1] South Carolina requests that North

[1] In *Jones*, the district court considered whether the Catawba River constitutes a navigable river, thereby giving rise to admiralty jurisdiction. The use of the phrase

Carolina be preliminarily enjoined from authorizing any interbasin transfers of water from the Catawba River in excess of those transfers that had been authorized by North Carolina as of June 7, 2007. Application, p. 1.

North Carolina law requires a permit for the transfer of more than two million gallons of water per day from one river basin to another. N.C. Gen. Stat. § 143-215.22I(a)(1) (2005).[2] In determining whether a permit should be granted, the North Carolina Environmental Management Commission [hereinafter "NC EMC"] must consider the reasonableness of the transfer, present and future detrimental effect on the river basins and whether reasonable alternatives exist to the proposed transfer. N.C. Gen. Stat. § 143-215.22I(f) (2005).

South Carolina's motion for leave to file a Bill of Complaint was apparently precipitated in part by the NC EMC issuing a permit to the cities of Concord, N.C. and Kannapolis, N.C. to transfer no more than 10 million gallons per day from the Catawba River basin to the Rocky River sub-basin. *See* Mot. for Leave to File Bill of Compl., app. 7-8 [hereinafter "Compl. Mot."] (letter from Attorney General McMaster to Attorney General Cooper). Even if Concord and Kannapolis were to transfer the

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"inadequate water volume" by the *Jones* court is in the context of summarizing three reports prepared by the Army Corps of Engineers dated 1875, 1880 and 1887. Those reports address whether the Catawba River is potentially navigable and pre-date the construction of Duke Energy's dams on the Catawba River. Moreover, neither these reports nor the *Jones* decision addresses whether the Catawba River has adequate water volume for public water supplies and other consumptive uses.

[2] On August 2, 2007, the North Carolina General Assembly ratified House Bill 820. The bill repeals N.C. Gen. Stat. § 143-215.22I, the existing statute governing interbasin transfers, replacing it with a new N.C. Gen. Stat. § 143-215.22L. While the new statute retains many features of the existing regulatory scheme, it places additional requirements on applicants for interbasin transfers. As of the date of the filing of North Carolina's brief in this matter, the Governor had not signed the bill; therefore, it is not yet effective. However, the bill will become law, unless vetoed. N.C. Const. art. II, § 22, pt. 7.

maximum quantity allowed under this permit, the transfer would constitute less than 0.4% of the average daily flow of the river into South Carolina. Although the Concord/Kannapolis interbasin transfer apparently triggered the filing of the present action, South Carolina is not seeking to enjoin the Concord/Kannapolis transfer in its Application. The permit to Concord and Kannapolis was issued on January 10, 2007; however, in the Application, South Carolina seeks only to preliminarily enjoin the issuance of new permits approved after June 7, 2007. *See* Bill of Compl. ¶ 28 (Concord/Kannapolis permit issued January 10, 2007); Application, p. 1 (requesting North Carolina be prohibited from authorizing interbasin transfers "in excess of those authorized as of the date of this application").

The process for obtaining an interbasin transfer permit from the NC EMC is lengthy, complex and expensive. Decl. of Morris, app. 50a. The State's statutes provide for a period to receive public comments, the submission of detailed technical information, and thorough review by both the staff of the North Carolina Department of Environment and Natural Resources [hereinafter "NC DENR"] and the NC EMC. *See* N.C. Gen. Stat. § 143-215.22I(c), (d), (f1) (2005). Accordingly, the process generally requires a minimum of two years from submission of a petition to the issuance of an interbasin transfer permit. In the case of Concord and Kannapolis, for example, the time period between submission of a petition until issuance of a permit was over two years. Decl. of Morris, app. 50a.

Currently, there are no pending petitions with the NC EMC for an interbasin transfer from the Catawba River. Decl. of Fransen, app. 3a. Although Union County, N.C. forwarded a preliminary Environmental Impact Statement to the NC EMC concerning a potential petition for an interbasin transfer, Union County has not taken further steps to pursue an interbasin transfer and has not tendered a petition to the

NC EMC.[3] *Id.* In fact, NC DENR has been informed by Union County that it is exploring options other than applying for a certificate for an interbasin transfer from the Catawba River basin. *Id.*

Further background relating to this dispute is set out in North Carolina's brief in opposition to the motion for leave to file a Bill of Complaint. That brief is being filed contemporaneously with the present response to the Application.[4]

ARGUMENT

In *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987), this Court recognized the fundamental principle that "an injunction is an equitable remedy that does not issue as of course." As this Court has long recognized, the burden upon a State seeking a preliminary injunction in an original jurisdiction action "is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties." *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931).

In considering South Carolina's motion, this Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co.*, 480 U.S. at 542; *accord Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982). This balancing should generally include an analysis of the public interest. *See Weinberger*, 456 U.S. at 312-13, 320. Additionally, whether the plaintiff is likely to succeed on the merits constitutes a substantial factor in determining the appropriateness of a preliminary

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[3] South Carolina's Application erroneously refers to an application pending before the NC EMC by Union County for an interbasin transfer from the Catawba River. Application, pp. 1-2.

[4] The declarations cited herein are contained in the appendix to the brief of North Carolina in opposition to South Carolina's motion for leave to file a Bill of Complaint.

injunction. *See Sole v. Wyner*, 127 S. Ct. 2188, 2195 (2007); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Consideration of these factors demonstrates that South Carolina's motion should be denied. Moreover, the motion is premature at this stage of the proceedings.

I. SOUTH CAROLINA WILL SUFFER NO IRREPARABLE HARM IF ITS APPLICATION FOR A PRELIMINARY INJUNCTION IS DENIED.

South Carolina will suffer no irreparable harm if the Application is denied. In fact, the status quo will be maintained for at least the next two years if this Court were to take no action on the Application.

The scope of the preliminary injunction requested by South Carolina is limited. South Carolina only seeks an injunction "prohibiting North Carolina from authorizing transfers of water from the Catawba River in excess of those authorized as of the date of this application." Application, p. 1. Thus, the Application prays that North Carolina be preliminarily enjoined from issuing any additional interbasin transfer permits.[5] Currently, no petitions for interbasin transfer permits for the Catawba River, its lakes or tributaries are pending before the NC EMC.[6] Even if such a petition were filed

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[5] South Carolina's Application uses the words "transfer" and "interbasin transfer" interchangeably. From the context of the Application, it is clear that South Carolina intends the word "transfer" to refer to removing water from one river basin and transferring it to another river basin. If, however, this Court were to read South Carolina's application as seeking to prohibit any additional consumption of water within the Catawba River basin by North Carolina residents (as opposed to the transfer of water from the Catawba River to another basin), North Carolina would suffer substantial and immediate harm if such an injunction were issued.

[6] The North Carolina statute does authorize the Secretary of NC DENR to approve a temporary interbasin transfer under emergency situations. N.C. Gen. Stat. § 143-215.22I(j) (2005). Even under emergency conditions, the Secretary is required to consult with potentially impacted parties. *Id.* The Secretary's authority to approve an emergency transfer has only been exercised once in the 15 years this statute has been in existence. *See* Decl. of Fransen, app. 3a-4a. That emergency authorization did not involve the Catawba River basin. *Id.*

tomorrow, the evaluation process would take approximately two years. Accordingly, should the Court decline to issue a preliminary injunction and should a petition for an interbasin transfer relating to the Catawba River be filed with the NC EMC in the future, South Carolina will have ample opportunity to renew its motion at that time. Thus, South Carolina simply cannot show that it faces any immediate, irreparable harm. This Court should not issue an injunction based upon the possibility of indefinite, future injury. *Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945).

Not only is South Carolina unable to point to any pending petition for an interbasin transfer from the Catawba River, South Carolina also cannot show that it would be harmed should such a hypothetical petition be approved by the NC EMC in the future. In support of its motion for leave to file a Bill of Complaint, South Carolina relies upon the affidavit of A.W. Badr. In this affidavit, Badr testifies: "Most of the time, there will be ample water in the system so that water transfers out of the basin will not be harmful to South Carolina . . . ." Compl. Mot., app. 14a (affidavit of A.W. Badr). Thus, South Carolina cannot claim that it will be harmed by any and all interbasin transfers, regardless of the quantity, duration or permit conditions of such transfers. Accordingly, South Carolina's blanket request that this Court preclude all additional interbasin transfers from the Catawba River should be summarily rejected. Moreover, whether any specific interbasin transfer will have a detrimental effect upon the basin should be entrusted, in the first instance, to the agency (i.e., NC EMC) with the technical expertise to evaluate and weigh those potential effects. If South Carolina disagrees with any such determination, its remedy is to request a preliminary injunction at that time – not to preclude North Carolina from making beneficial use of the waters of the Catawba River through interbasin transfers under all circumstances. This is particularly true given that the Catawba River basin is not currently experiencing extreme or prolonged drought.

In its request to enjoin North Carolina from authorizing any further interbasin transfers, South Carolina ignores the fact that it previously agreed that there is more than enough water in the Catawba River to support all of the interbasin transfers that are the subject of South Carolina's Bill of Complaint. During the current relicensing of the Duke Energy dams on the Catawba River, South Carolina (through its various agencies), North Carolina, Duke Energy and various stakeholders entered into a Comprehensive Relicensing Agreement [hereinafter "CRA"] that has been submitted to the Federal Energy Regulatory Commission [hereinafter "FERC"]. In this document, South Carolina acknowledged that even if North Carolina were to transfer 85 million gallons per day out of the Catawba River basin, the flow into South Carolina would still be "expected to meet existing and projected future (Year 2058) water use needs." Decl. of Fransen, app. 9a-10a (quoting CRA). The total of all existing interbasin transfers approved by the NC EMC is clearly less than 85 million gallons per day. Having executed a settlement agreement before FERC in which South Carolina acknowledges that the flow of the river is sufficient to support additional interbasin transfers over and above all currently authorized transfers, South Carolina can hardly argue to this Court that it will be irreparably harmed if any interbasin transfer is approved by North Carolina in the future.

South Carolina has not shown that it will suffer any irreparable harm should its application be denied. An injunction should only be issued "to prevent existing or presently threatened injuries." *Connecticut v. Massachusetts*, 282 U.S. at 674. An injunction "will not be granted against something merely feared as liable to occur at some indefinite time in the future." *Id.*

II. NORTH CAROLINA WILL SUFFER HARM IF A PRELIMINARY INJUNCTION IS GRANTED.

A preliminary injunction would effectively preclude applicants from submitting a petition to the NC EMC, even if an interbasin transfer were the only feasible option for responding to the water needs of a community or business. The fact that a petition for an interbasin transfer is not pending currently does not mean that issuance of a preliminary injunction would not harm North Carolina. The process by which the NC EMC determines whether to grant a petition for an interbasin transfer is complex and lengthy. Accordingly, if a need for such interbasin transfer arises, any delay in beginning the lengthy and arduous process of obtaining authorization for an interbasin transfer could present a very real harm for the community needing water from the Catawba River.

This Court should not preclude the NC EMC from taking appropriate action should other communities and businesses outside of the Catawba River basin demonstrate a need to draw water from the basin in order to alleviate real and substantial hardships.[7] If other interbasin transfer requests are filed with the NC EMC, South Carolina will have sufficient time to refile a request for a preliminary injunction raising the specific concerns it has with those requests, before any action is taken by the NC EMC. A blanket prohibition precluding the issuance of any interbasin

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[7] The NC EMC has been faithfully fulfilling its statutory obligation to consider harm to both the basin where the water is being withdrawn and the basin to where the water is delivered. In the case of the request by Concord and Kannapolis, for example, the NC EMC considered impacts to flows from and lake levels of all reservoirs along the Catawba River, including those in South Carolina, and concluded that the impacts in both States would be insignificant. Nonetheless, the NC EMC reduced the transfer from the Catawba River from the requested amount of 36 million gallons per day to 10 million gallons per day based on the NC EMC's determination of the cities' need for the water. To the extent South Carolina implies that the NC EMC is not fulfilling its obligation to protect all downstream users on the Catawba River (including users in South Carolina), South Carolina is mistaken.

transfer from the Catawba River during the several years this original jurisdiction action may be before the Court clearly harms North Carolina.[8] Moreover, the blanket prohibition requested by South Carolina would deprive this Court of the opportunity to consider a factual record with respect to specific interbasin transfers.

III. SOUTH CAROLINA IS NOT LIKELY TO SUCCEED ON THE MERITS.

South Carolina is not likely to succeed on the merits for three reasons. First, the present claim is not an appropriate case for the exercise of original jurisdiction by this Court. Second, the material filed by South Carolina in support of its application does not establish by clear and convincing evidence that North Carolina has deprived South Carolina of any right with respect to the Catawba River. Third, South Carolina's arguments are incorrectly premised upon an assumption that interbasin transfers should be presumed to be harmful.

1. The Court should refrain from granting South Carolina leave to file a Bill of Complaint given the pendency of proceedings currently before FERC that will substantially, if not entirely, resolve the present dispute. The present action does not constitute an appropriate case for the exercise of original jurisdiction because an adequate forum exists for the resolution of the issues raised by South Carolina. Accordingly, for the reasons set out in North Carolina's Brief in Opposition to South

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[8] For example, the State of North Carolina would have incurred substantial harm if a preliminary injunction had been in place at the time of application by Concord and Kannapolis. Because these cities lie at the uppermost portion of the Rocky River watershed, very limited yield can be obtained by that watershed. Concord and Kannapolis therefore had no viable option to meet their water needs other than transfers from other river basins. As set out in the declarations of Hiatt and Legg, Concord and Kannapolis would have suffered substantial harm if an interbasin transfer had not been authorized. Decl. of Hiatt, app. 22a-29a; Decl. of Legg, app. 30a-37a.

Carolina's Motion to File a Bill of Complaint, this Court need not, and should not, exercise its original jurisdiction of the complaint.

2. This Court should not exercise "its extraordinary power under the Constitution to control the conduct of one State at the suit of another" unless the threatened invasion of rights is of serious magnitude and is "established by clear and convincing evidence." *Washington v. Oregon*, 297 U.S. 517, 522 (1936) (internal quotations omitted); *accord Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982). The material submitted by South Carolina in support of its motion does not establish by clear and convincing evidence that North Carolina has deprived South Carolina of any right with respect to the Catawba River. As explained in the declaration of Thomas Fransen, the report of A.W. Badr, upon which South Carolina's motion is founded, does not adequately and properly analyze the flow of the Catawba River. Decl. of Fransen, app. 12a-15a. Accordingly, South Carolina has failed to establish that it is being deprived of its fair share of the Catawba River.

3. South Carolina's argument is premised upon an inappropriate assumption that interbasin transfers should be presumed to be harmful. Specifically, South Carolina asks this Court to "enter a decree . . . declaring North Carolina's interbasin statute invalid with respect to inequitable transfers out of the Catawba River." Compl. Mot. 9.

As this Court has long recognized, the "removal of water to a different watershed obviously must be allowed at times" and "has been allowed repeatedly" by this Court. *New Jersey v. New York*, 283 U.S. 336, 343 (1931); *see also Connecticut v. Massachusetts*, 282 U.S. 660 (1931) (allowing Massachusetts to transfer water out of the Connecticut River watershed).

In fact, South Carolina law allows for interbasin transfers. S.C. Code Ann. §§ 49-21-10 to -80 (Supp. 2006). Moreover, South Carolina has authorized interbasin

transfers from the Catawba River basin. Nevertheless, South Carolina argues to this Court that North Carolina's interbasin transfer statute should be declared invalid. Such an argument was rejected by this Court 85 years ago. In *Wyoming v. Colorado*, 259 U.S. 419, *modified*, 260 U.S. 1 (1922), *vacated and new decree entered*, 353 U.S. 953 (1957), Wyoming argued that Colorado should be precluded from diverting water from the Laramie River to another watershed "from which [Wyoming] can receive no benefit" because the diverted water would not flow into Wyoming. *Id.* at 466. This Court rejected Wyoming's position as "untenable," concluding that diversion of water from one watershed to another "does not in itself constitute a ground for condemning it." *Id.* This reasoning holds particularly true here because, unlike the situation in *Wyoming v. Colorado*, any interbasin transfer authorized by the NC EMC ultimately flows to South Carolina in another watershed. In the case of the Concord and Kannapolis interbasin transfer, for example, the South Carolina Department of Natural Resources [hereinafter "SC DNR"] concluded that the interbasin transfer would merely divert water to the Pee Dee River basin "where we may need it more anyway." Decl. of Fransen, app. 18a (quoting SC DNR e-mail).

South Carolina cannot establish that it is likely to succeed on the merits.[9]

IV. THE PUBLIC INTEREST WEIGHS IN FAVOR OF DENYING THE MOTION.

As set out above, South Carolina will suffer no harm should its application be denied. In contrast, North Carolina has demonstrated that its citizens may incur harm if a preliminary injunction is granted. Because both States are acting in their capacity

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[9] Moreover, a preliminary injunction barring North Carolina from transferring water from the Catawba River would be inconsistent with South Carolina's request for equitable apportionment. Equitable apportionment only addresses each State's entitlement to a portion of the flow of the river and leaves to each State the right to determine the most beneficial use of that water. Thus, the Application inappropriately intrudes upon the sovereign prerogatives of a sister State.

as parens patriae, the balancing of the harms also determines the impact upon the public interest. *See United States v. Nevada*, 412 U.S. 534, 539 (1973) (recognizing that State may act as parens patriae with respect to water resources). Here, the public interest weighs in favor of denying the motion.

V. A RULING UPON SOUTH CAROLINA'S APPLICATION FOR A PRELIMINARY INJUNCTION WOULD BE PREMATURE AT THIS STAGE OF THE PROCEEDINGS.

In the event the Court grants South Carolina leave to file a Bill of Complaint, the matter should be referred to a Special Master. A preliminary injunction should not be issued based upon the conclusory affidavits submitted by South Carolina, particularly when the affiants have not been subjected to cross-examination.

South Carolina's argument that it is not receiving its fair share of the waters of the Catawba River rests primarily upon the affidavit of A.W. Badr. North Carolina, however, has not had the opportunity to cross-examine Badr about his prior inconsistent statements. When Badr originally examined the proposed Concord/Kannapolis interbasin transfer, he concluded that such a transfer would have no detrimental impact upon South Carolina. In an e-mail of August 5, 2005, Danny Johnson of the SC DNR informed Thomas Fransen of the NC DENR's Division of Water Resources that Badr had concluded the proposed transfer was not large enough to affect South Carolina:

> As follow-up to our recent conversation . . . regarding the subject IBT [i.e., interbasin transfer], I've re-discussed the matter with [A.W. Badr] and our Division Director, and the consensus opinion is that the transfer is not large enough to be of concern to us. Besides, we get it back in the Pee Dee where we may need it more anyway. So, we have considered the proposed transfer and do not feel we are sufficiently aggrieved to warrant commenting on the permit application. Thanks for the info on it.

Decl. of Fransen, app. 18a (quoting SC DNR e-mail). Importantly, at the time that Badr came to this conclusion, Concord and Kannapolis were proposing to transfer a maximum of 38 million gallons per day from the Catawba River basin - substantially

more than the 10 million gallons per day that was ultimately approved by the NC EMC. *See id.* at 18a-19a. Thus, according to the e-mail, Badr and Johnson had concluded that even if Concord and Kannapolis transferred 28 million gallons per day more than the final authorized transfer amount, it would not even "warrant commenting" by South Carolina.

North Carolina has also not had an opportunity to cross-examine Badr concerning serious deficiencies of the report he has filed with this Court. As explained in the declaration of Thomas Fransen, Badr's analysis of the Catawba River assumes that there are no reservoirs on the river and that North Carolina consumes no water from the river. Consequently, given such artificial and unrealistic assumptions, Badr's report provides virtually no assistance to the Court in determining if South Carolina is being deprived of its fair share of water. Moreover, North Carolina has not had an opportunity to cross-examine South Carolina officials about South Carolina's acknowledgment in the CRA that even if North Carolina were to make interbasin transfers of 85 million gallons per day from the Catawba River, the flow into South Carolina would still be "expected to meet existing and projected future (Year 2058) water use needs." Decl. of Fransen, app. 9a-10a (quoting CRA). If the court determines to invoke its exclusive original jurisdiction, a preliminary injunction should only be considered after the Special Master directs discovery to proceed and considers the scientific evidence with respect to water flow and usage of the Catawba River.

CONCLUSION

South Carolina's application for a preliminary injunction should be denied.

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August 7, 2007

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No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To File Complaint

REPLY BRIEF OF THE STATE OF SOUTH CAROLINA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE COMPLAINT

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INTRODUCTION

North Carolina's inequitable interbasin transfers of water out of the Catawba River Basin have caused – and continue to threaten – substantial harm to South Carolina during periods when the Catawba River is at less than adequate flows. Contrary to North Carolina's assertions, that harm to South Carolina is not due solely to natural forces or the actions of Duke Energy, but rather is significantly exacerbated by North Carolina's unilateral actions. Although many factors affect the complex ecological conditions of the Catawba, North Carolina's actions in authorizing the transfer of at least 72.4 million gallons per day ("mgd") from the river necessarily decrease the available water for South Carolina. The uncertainty over the continued supply of the Catawba for South Carolina residents – and the absence of any other forum in which to obtain an equitable apportionment of the river – amply justifies this Court's exercise of original jurisdiction.

North Carolina erroneously asserts that South Carolina can obtain full relief from North Carolina's harmful conduct in Federal Energy Regulatory Commission ("FERC") proceedings relating to the re-licensing of a Duke Energy hydroelectric project. FERC has no authority under the Constitution to apportion river waters, so any orders it issues regarding Duke Energy cannot address the harms caused to South Carolina's citizens from North Carolina's inequitable and unilateral apportionment of the Catawba. Moreover, FERC's re-licensing decisions do not force North Carolina to recognize South Carolina's legal rights in considering future interbasin transfers from the river. North Carolina has refused to enter into negotiations toward an interstate compact regarding apportionment of the Catawba, so "[a] resort to the judicial power is [therefore] the only means left" for South Carolina to protect its rights. *Kansas v. Colorado*, 185 U.S. 125, 144 (1902) (internal quotations omitted). Accordingly, the Court should grant South Carolina's motion for leave to file a complaint and appoint a Special Master to make a recommendation as to an equitable apportionment of the Catawba River.

ARGUMENT

I. THIS COURT IS THE ONLY APPROPRIATE FORUM FOR RESOLVING THIS DISPUTE

A. This Case Meets The Normal Standards For This Court's Original Jurisdiction

In this controversy between two States, the Supreme Court's jurisdiction is both original and exclusive. *See* 28 U.S.C. § 1251(a); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450 (1945). South Carolina's complaint falls squarely within one of the longstanding areas this Court has identified as "particularly appropriate" for the exercise of its original jurisdiction, namely, the equitable apportionment of interstate streams. *See Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1031 n.1 (1983) (O'Connor, J., dissenting) (citing *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923)). Indeed, this Court has repeatedly acknowledged its "serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States." *Arizona v. California*, 373 U.S. 546, 564 (1963).

No other forum is available to South Carolina. "[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). And no such questions can be resolved by administrative agencies of the federal government. *See, e.g., Georgia v. Pennsylvania R.R.*, 324 U.S. at 455, 462 (holding "[t]he relief which Georgia seeks is not a matter subject to the jurisdiction of the [Interstate Commerce] Commission"; rather, exercise of the Court's original jurisdiction provided the only "adequate or effective remedy").

Moreover, South Carolina has exhausted political channels in attempting to negotiate this dispute with North Carolina. Prior to seeking leave to file this action, South Carolina, through its Attorney General, expressed its

objection not only to the specific interbasin transfer to Kannapolis and Concord, but also to North Carolina's process of "unilaterally" granting interbasin transfers "without addressing the needs and rights of [South Carolina]." SC App. 1-2. South Carolina's Governor and representatives in Congress from the districts that include the Catawba and Pee Dee Basins expressed the same concerns. *See id.* at 7. South Carolina urged North Carolina to stay its hand regarding the Kannapolis-Concord transfer to allow the parties an opportunity to negotiate an interstate compact, and a Bi-State Advisory Commission made a similar recommendation.[1] But North Carolina ignored those entreaties and granted the proposed Kannapolis-Concord interbasin transfer.

Since this suit was filed, North Carolina has sought to change the facts to "mitigate" this dispute.[2] The North Carolina Assembly has authorized minor amendments to the interbasin transfer statute, and Union County has suspended (for the time being) its long-pending transfer application. *See* NC Opp. 5 n.2; NC Prelim. Inj. Opp. 2 n.2, 3-4. But those temporary palliatives do not alter the fact that South Carolina has no other alternative for protecting its rights and those of her citizens except to invoke the original jurisdiction of this Court. *See Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (holding "the injury

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[1] Specifically, the Catawba/Wateree River Basin Bi-State Advisory Commission, whose members include elected representatives from both North and South Carolina, passed a resolution – submitted to the North Carolina Environmental Management Commission ("EMC") by *North Carolina Senator* Dan Clodfelter – recommending that the EMC "delay action for six months and allow the [Commission] the opportunity to attempt to assess this situation and mediate a solution," including the development of "formal procedures and compacts whereby [interstate resolutions to future issues of similar nature [could] be addressed with all participants contributing to the decision-making process." SC App. 30. The EMC refused this suggestion of a cooperative decisionmaking process and granted the permit unilaterally.

[2] *Thursday, Aug. 2, 2007, at the North Carolina General Assembly*, The Fayetteville Observer (Aug. 2, 2007), *available at* http://www.fayobserver.com/article.aspx?id=108588

complained of" – relating to an upstream State's harmful use of an interstate river – "is such that an adequate remedy can only be found in this court at the suit of the state of Missouri").

B. The FERC Re-licensing Proceedings Cannot Afford South Carolina Full Relief

North Carolina incorrectly asserts that FERC can provide South Carolina with an adequate remedy against North Carolina's unilateral interbasin transfers and that FERC proceedings to determine whether and under what conditions Duke Energy should be granted a new license to continue the operation of its hydroelectric plants along the Catawba River could "substantially resolve the matters in dispute." NC Opp. 15.

First, under the Federal Power Act ("FPA"), FERC has authority to issue a license, upon satisfactory conditions, to operators of hydroelectric projects, such as Duke Energy. *See* 16 U.S.C. §§ 792, 817(1). FERC does not have jurisdiction to oversee water withdrawals made under state statutes, such as the North Carolina interbasin transfer statute. Indeed, under the FPA, FERC has no jurisdiction over governmental entities. *See* 16 U.S.C. § 824(f); *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 911 (9th Cir. 2005), *petition for cert. pending*, No. 07-155 (filed Aug. 6, 2007). Rather, FERC's only recourse for a violation of its licensing conditions is with Duke Energy, and not a State. And Duke Energy is in no way responsible for administering or authorizing any of the interbasin transfers that underlie South Carolina's complaint. As Duke Energy has explained in FERC filings, "[w]hile Duke Energy manages the lakes, it is the State of North Carolina or the State of South Carolina that makes the decisions on whether to grant [interbasin transfer] certifications." Letter from Ernest M. Oakley, Duke Energy, to Magalie R. Salas, FERC, Attach. at 2 (Jan. 22, 2007). FERC thus has no means of penalizing North Carolina's continued approvals of inequitable and unilateral interbasin transfers. *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S.

437, 452 (1992) (noting that suggestion of alternative proceedings provided no assurance "that a State's interests under the Constitution will find a forum for appropriate hearing and full relief"). North Carolina therefore is simply wrong that those FERC proceedings can adequately remedy South Carolina or justify this Court's declining to exercise its original jurisdiction.[3]

Second, North Carolina is incorrect (at 16-17) that the Comprehensive Relicensing Agreement ("CRA") will resolve this issue. In fact, CRA § 39.9 expressly disclaims resolution of the water rights issues raised in this case:

> Water Rights Unaffected – This Agreement does not release, deny, grant or affirm any property right, license or privilege in any waters or any right of use in any waters.

North Carolina's own key participant in the Duke Energy re-licensing proceedings, Steven Reed, who is Environmental Supervisor for North Carolina's Division of Water Resources, has acknowledged that the Low Inflow Protocol ("LIP") laid out in the CRA – and which is triggered at the critical time when flows become inadequate – *affects only how Duke Energy uses the water in the river*, not other users or stakeholders in the re-licensing process: "[T]he LIP would not reduce the amount of water each party (except Duke) is permitted to use. The parties have requested that FERC impose the LIP on Duke as a condition of the new license." NC App. 58a. Thus, contrary to North Carolina's assertions (at 16-17), the CRA cannot resolve the rights of North Carolina and South Carolina to the waters of the Catawba River.

[3] In *New Jersey v. Delaware*, No. 134 Orig., this Court permitted New Jersey's complaint to proceed notwithstanding the existence of FERC proceedings that Delaware asserted would moot New Jersey's case. *See* DE Opp. to NJ Mot. To Reopen at 26-27, No. 11 Orig. (U.S. filed Oct. 27, 2005). Similarly, this Court in *Maryland v. Louisiana*, 451 U.S. 725 (1981), accepted jurisdiction notwithstanding a pending FERC proceeding. *See id.* at 737 n.13.

C. The Proposed Duke Energy License Will Not Offset North Carolina's Inequitable Interbasin Transfers In Any Event

North Carolina also argues incorrectly that, if FERC decides to accept the proposed license for Duke Energy, the minimum flows from the Lake Wylie dam imposed on Duke Energy as a condition of that license will have the practical effect of offsetting the harms to South Carolina caused by the challenged interbasin transfers.

First, North Carolina asserts (off-point) that, under the proposed new license, South Carolina will enjoy more protections *vis-à-vis* Duke Energy as to certain *minimum* flows than it does under the expiring license. But the expiring license terms do not establish the appropriate baseline against which to measure South Carolina's (or North Carolina's) *equitable* share of the Catawba River under federal common law. Thus, the mere assertion that South Carolina may be better off under the new license does not automatically render North Carolina immune from claims that it has taken more than its fair share.

Second, although Duke Energy can control the Lake Wylie dam *in the sense* that its releases for power generation affect downstream users of the Catawba, it has no authority to determine the volume of water North Carolina authorizes to be withdrawn from the Catawba River Basin above that point. Importantly, under the LIP proposed in the new license, when less water flows into the system, Duke Energy is allowed to release less water from the Lake Wylie dam. *See* NC Opp. 13-14; NC App. 69a-86a. Thus, excessive interbasin transfers can – and, if unabated, likely will – artificially trigger provisions in the CRA that allow for lower flows into South Carolina.

Third, North Carolina argues that, because the model used in reaching the CRA was based on the assumption that North Carolina's consumptive transfers would increase to 85 mgd over the course of the proposed 50-year license period, all transfers of lesser volume cannot be harmful. That factual claim, however, is inappropriate

for resolution at this stage. Importantly, the CRA does not limit North Carolina to authorizing the transfer of no more than 85 mgd out of the Catawba for the next 50 years (nor does it obligate South Carolina to acquiesce in transfers up to that level). In addition, as the Morris declaration shows, in the roughly 15 years North Carolina's interbasin transfer statute has been in effect, the EMC has authorized the transfer of 43 mgd out of the Catawba, and the statute "grandfathered" the transfer of another 29.54 mgd out of the Catawba. *See* NC App. 48a-49a. Thus, North Carolina has already authorized the transfer of 72.54 mgd out of the Catawba. *See id.*

That trend virtually guarantees that, without this Court's action, North Carolina will have authorized transfers far in excess of 85 mgd within the next 50 years – indeed, the Union County interbasin transfer alone would cause North Carolina to exceed 85 mgd. South Carolina can derive little comfort from North Carolina's permit holders typically not withdrawing the maximum amount allowed under their permits. As North Carolina acknowledges, the permitting process is arduous, *see* NC Prelim. Inj. Opp. 8, and permit applicants understandably seek permits they can "grow into." As these permits age, however, permit holders will use more and more of the maximum allowed before seeking a new permit. Moreover, given that the interbasin transfers are often granted as a supplement to another primary water supply, which will become scarce in times of drought, permit holders may well withdraw more water from the Catawba when it will be most harmful to South Carolina. The CRA therefore does not offer a practical solution to North Carolina's inequitable apportionments.

D. The CRA In No Way Estops South Carolina From Bringing This Complaint

North Carolina's suggestion that South Carolina is somehow estopped from bringing this case because certain of its agencies participated in reaching the CRA is untenable. First, North Carolina mischaracterizes the CRA,

which merely acknowledges that "modeling and evaluation have predicted that . . . the flow releases anticipated from the . . . [Lake Wylie dam] are expected to meet existing and projected future (Year 2058) water use needs." NC App. 9a-10a. That quite tentative statement – which is explicitly made "subject to change and review during the term of the New License," *id.* at 10a – in no way expresses South Carolina's acquiescence to North Carolina's harmful interbasin transfers.

Moreover, the South Carolina agency authorized by law to represent the State in matters involving interbasin transfers, the Board of the Department of Health and Environmental Control ("DHEC"), has not consented to the CRA. *See* S.C. Code §§ 49-21-10, 49-21-80 (empowering DHEC's Board, subject to the approval of the General Assembly, to "negotiate agreements, accords, or compacts on behalf of and in the name of the State with other states"). To the contrary, after Concord and Kannapolis first proposed a transfer of up to 38 mgd, DHEC's Chief of the Bureau of Water, Alton Boozer, wrote to Thomas Fransen in 2001 of his "concern[] with the potential impact that this and any other proposed transfers will have on the water quality and quantity of the Catawba River, and what impact it will have on down stream users." App., *infra*, 1a.

Even if the CRA could bear the weight North Carolina places upon it, North Carolina's suggestion of estoppel is legally misconceived. It is settled law that "[a] state cannot estop itself by grant or contract from the exercise of the police power." *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 427 (1925). Indeed, even an explicit act of South Carolina's legislature could "neither bargain away the police power nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health, and morals of all who may be within their jurisdiction." *Texas & N.O.R.R. v. Miller*, 221 U.S. 408, 414 (1911).

II. NORTH CAROLINA'S UNILATERAL INTERBASIN TRANSFERS HARM SOUTH CAROLINA

North Carolina blames natural forces for the harms its interbasin transfers cause, claiming (at 18) that "[t]he gist of South Carolina's complaint is that the Catawba River produces less water in times of drought." Indeed, its supporting declarations seek to demonstrate that North Carolina suffered from the recent drought as well and that, most of the time, the Catawba River carries enough water to satisfy all current uses. But those arguments in fact *support* this Court's jurisdiction to impose an equitable apportionment. South Carolina's complaint asserts that, in times of inadequate flows, North Carolina's interbasin transfers substantially and unlawfully exacerbate the harm to South Carolina over and above that caused by other forces. *See, e.g.*, SC App. 14. And, because North Carolina will not agree to a compact or restrict its withdrawals, South Carolina has no means of protecting itself during times when the Catawba's flow is inadequate and North Carolina takes more than its fair share.

A. South Carolina's Complaint Appropriately Focuses On Times Of Inadequate Flow

It is undeniably true that droughts happen only some of the time. In fact, North Carolina has declared that "extreme drought" conditions now exist in a portion of the Catawba River Basin, with "severe drought" conditions prevailing in the remainder.[4] And, as Dr. Badr's summary report shows, the Catawba periodically experiences inadequate flows even absent drought conditions. *See* SC App. 16 ("The Catawba River can experience very low flows at any time of year, not just during the dry summer and fall months.").

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[4] *Compare* North Carolina Drought Management Advisory Council http://www.ncdrought.org (visited Aug. 19, 2007) (showing drought areas) *with* North Carolina Division of Water Quality *General Map of the Catawba River Basin* http://h2o.enr.state.nc.us/basinwide/which_basin/catawba.htm (visited Aug. 19, 2007). *See also* Assoc. Press, *Official: S.C.'s drought status could be upgraded to severe soon* (Aug. 21, 2007), http://www.wilmingtonstar.com/article/20070821/APN/708210770

This Court's past equitable-apportionment decrees have routinely – and appropriately – taken into account variances in a river's flow. *See, e.g., New Jersey v. New York*, 283 U.S. 336, 346-47 (1931) (establishing injunction setting a certain level below which, consistent with New Jersey's equitable rights, New York had to allow the Delaware River to pass); *see also Colorado v. New Mexico*, 459 U.S. 176, 189 (1982) (ordering Special Master to consider "extent to which present levels of use reflect current or historical water shortages"). South Carolina seeks a similar apportionment from the Court here.

B. Disputed Factual Issues Raised By North Carolina Highlight The Need For A Special Master

Among other factual issues, North Carolina challenges causation – whether the harm South Carolina alleges is caused by North Carolina's interbasin transfers or instead by some other force – but that question cannot be resolved at this stage of the litigation. South Carolina adequately alleges substantial harm from North Carolina's interbasin transfers and is accordingly entitled to prove its claim. *See Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995) (noting that Nebraska's "allegations describe a change in conditions sufficient, if proven, to warrant the injunctive relief sought, and Nebraska is accordingly entitled to proceed with its claim"). Similarly, North Carolina's various efforts to impeach South Carolina's witnesses or to quarrel with experts' theories, at best, raise disputed factual issues that should not be resolved on the present record. *See, e.g., Kansas v. Colorado*, 185 U.S. at 147 (holding that, "in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence"). Appointment of a Special Master in this matter is therefore warranted.

CONCLUSION

The Court should grant South Carolina's motion for leave to file a complaint and appoint a Special Master to make a recommendation how the Catawba River should be equitably apportioned.

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Vice Chairman

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Larry R. Chewning, Jr., DMD

December 14, 2001

Mr. Tom Franzen
Division of Water Resources
North Carolina Department of Environment
and Natural Resources
1611 Mail Service Center
Raleigh, NC 27699-1611

Re: Catawba River Interbasin Transfer

Dear Mr. Franzen:

The South Carolina Department of Health and Environmental Control has reviewed the proposed Inter-Basin Transfer from the Catawba River basin to the Yadkin-Pee Dee basin. The Department is concerned with the potential impact that this and any other proposed transfers will have on the water quality and quantity of the Catawba River, and what impact it will have on down stream users.

We need to be assured that withdrawal of water from the Catawba River basin, with ultimate disposal in the Yadkin-Pee Dee basin, would not have adverse impacts on

water quality standards or water uses of the Catawba River. Municipalities and industries in South Carolina rely on the Catawba River for water supply and wastewater disposal. Moreover, citizens of South Carolina use the Catawba River and its lakes for recreation. Transfer of water from this basin could ultimately affect existing permits issued by SCDHEC.

Please consider this as notification of the Department's concerns of the proposed interbasin Transfer Permit. I would appreciate receiving a copy of the draft permit, if issued.

Sincerely yours,

/s/ Sally C. [illegible] for
Alton C. Boozer, Chief
Bureau of Water

No. 138, Original

IN THE
SUPREME COURT OF THE UNITED STATES

No. 06-A1150

STATE OF SOUTH CAROLINA,
Applicant,

v.

STATE OF NORTH CAROLINA,
Respondent.

RECEIVED
AUG 23 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AUG 22

On Motion for Leave To File Complaint

REPLY BRIEF IN SUPPORT OF APPLICATION OF THE STATE OF SOUTH CAROLINA FOR A PRELIMINARY INJUNCTION

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

South Carolina respectfully submits this reply in support of its application for a preliminary injunction to maintain the status quo in this matter pending the Court's review on the merits.

In an attempt to moot South Carolina's need for preliminary relief, North Carolina represents to the Court that an injunction is unnecessary because it will voluntarily maintain the status quo "for at least the next two years." NC Prelim. Inj. Opp. at 5. North Carolina then asserts its right to continue to authorize such transfers during that time — and on an expedited basis — whenever it perceives a need to do so. The inconsistency of those representations fully justifies the preliminary injunction that South Carolina seeks.

Since South Carolina filed its application with this Court, North Carolina has taken steps to evade — rather than to address — the complaints raised by South Carolina. First, North Carolina appears to have tabled (for the time being) the long-pending request of

Union County to increase the amount of water that it can transfer out of the Catawba River by 13 million gallons per day ("mgd"). Second, North Carolina's Assembly amended the interbasin transfer statute — hoping to "mitigate fighting between . . . [the] states"[1] — but left in place the aspects of the law that have given rise to this dispute.[2] Changing the method by which North Carolina, as the upstream State, determines what water should be left to South Carolina, the downstream State, will not protect South Carolina's equitable rights in the Catawba River. At a minimum, this Court should require that, until an equitable apportionment of the Catawba River is achieved, North Carolina cannot unilaterally authorize any additional interbasin transfers out of the Catawba River. Instead, such transfers should occur (if at all) only on application to, and approval by, a neutral third party, such as a Special Master appointed in this case to make appropriate recommendations to the Court. Such action would completely alleviate the harms that North Carolina claims would result from an injunction, while also providing South Carolina with adequate protection from further unilateral and harmful transfers by North Carolina.

A. Enjoining Further Transfers Without Some Neutral Third Party's Permission Would Eliminate The Harms That North Carolina Claims Would Result From An Injunction

Contrary to North Carolina's opposition, South Carolina has no objection to an injunction with reasonable limitations. In South Carolina's view, it would be entirely proper for the Court to enjoin North Carolina from authorizing any additional interbasin transfers from the Catawba River without express permission from the Special Master appointed in this matter. That would allow the Special Master to consider the impact of

---

[1] *Thursday, Aug. 2, 2007, at the North Carolina General Assembly*, The Fayetteville Observer (Aug. 2, 2007), *available at* http://www.fayobserver.com/article_ap?id=108689.

[2] As of the date of this filing, the amended interbasin transfer statute, which would replace the current § 143-215.22I with a new § 143-215.22L, remains subject to disapproval by the Governor.

any proposed transfer on uses of the Catawba River in South Carolina, which North Carolina has thus far ignored, and impose appropriate conditions on any such transfer during times of inadequate flow. Importantly, such an injunction would eliminate the harms that North Carolina claims would result from a "blanket" bar on additional transfers. In the event North Carolina proposes a transfer that would not invade South Carolina's rights in the Catawba River, North Carolina can be afforded a full opportunity to persuade the Special Master to lift the injunction as to that particular transfer.

By contrast, there is no reason for this Court to defer to the claimed "technical expertise" (NC Prelim. Inj. Opp. at 6) of the North Carolina Environmental Management Commission ("EMC"). Indeed, it is well settled that the proper apportionment of an interstate stream "is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). Rather, as South Carolina noted in its opening brief seeking leave to file a complaint, this case must be settled "on the basis of equality of right," recognizing "the equal level or plane on which all the States stand." *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931) (internal quotation marks omitted); *see* Brief of the State of South Carolina in Support of Its Motion for Leave To File Complaint at 10 ("SC Br.").

North Carolina's request for deference to its own agency is particularly inappropriate given that it was North Carolina's insistence on unilateral decisionmaking that precipitated this dispute. North Carolina's view is apparently that South Carolina (and the Court) should simply trust it to make equitable use of the waters of the Catawba River — without a framework for resolving interstate disputes, and without it having any incentive to give due regard for the impact of its consumptive uses on South Carolina and her citizens. That stance is untenable, as this Court has repeatedly held. *See, e.g.*,

Wyoming v. Colorado, 259 U.S. 419, 466 (1922) (rejecting the proposition that "a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in [an] interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary").

B. The Proposed Injunction Would Provide South Carolina With Important Protection From Further Harmful Transfers While An Equitable Apportionment Is Determined

Despite its careful suggestions that no new transfers are likely to be authorized in the next two years, North Carolina continues to threaten South Carolina with additional harm from its mounting unlawful and unilateral interbasin transfers. As this Court has explained in another original action, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923); *see also Missouri v. Illinois*, 180 U.S. 208, 243 (1901) (same); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-31 (1975) (affirming grant of preliminary injunction barring enforcement of town ordinance despite the absence of pending enforcement proceedings against plaintiffs).

1. North Carolina's assurances of no new transfers are critically incomplete. First, at the time South Carolina was preparing its initial application in this Court, North Carolina's EMC was considering a request from Union County to increase its maximum authorized daily transfer out of the Catawba from 5 mgd to 18 mgd. *See* Attach. A. Indeed, Union County has already completed a draft Environmental Impact Statement, which is a substantial step in the permitting process. *See id.* Yet, in opposing South Carolina's request for a preliminary injunction, North Carolina reports — without offering any details — that this proposed transfer is no longer pending because Union County is "exploring [other] options." NC Prelim. Inj. Opp. at 3-4; NC App. 3a (Fransen Decl. ¶ 7). Importantly, North Carolina does not foreclose the possibility that Union County will determine — after

this Court rules on South Carolina's motion for a preliminary injunction — that those other options are less preferable than a transfer out of the Catawba River, leading it to reinstate its partially completed application for an interbasin transfer.

Second, North Carolina's suggestion that no additional transfers will be authorized in the next two years because of the "lengthy and arduous process" (NC Prelim. Inj. Opp. at 8) for obtaining such authority ignores that the North Carolina interbasin transfer statute specifically authorizes the North Carolina Secretary of Environment and Natural Resources to grant a "temporary transfer" without resort to the ordinary permitting process "[i]n the case of water supply problems caused by drought." N.C. Code § 143-215.22I(j).[3] Such "temporary transfers" under the statute can last up to a year. *See id.* (authorizing initial six-month period with option to renew for an additional six months). North Carolina thus has an available means to circumvent the "lengthy and arduous" permitting process in a manner that makes a preliminary injunction an important remedy in this litigation. North Carolina, moreover, has now declared that a portion of the Catawba River Basin in North Carolina is experiencing "extreme drought" conditions, with the remainder experiencing "severe drought" conditions. *Compare* North Carolina Drought Management Advisory Council, http://www.ncdrought.org (visited Aug. 19, 2007) (showing drought areas), *with* North Carolina Division of Water Quality, *General Map of the Catawba River Basin*, http://h2o.enr.state.nc.us/basinwide/whichbasincatawba.htm (visited Aug. 19, 2007) (showing map of Catawba River Basin in NC). *See also* Assoc. Press, *Official: S.C.'s drought status could be upgraded to severe soon* (Aug. 21, 2007), http://www.wilmingtonstar.com/article/20070821/APN/708210776. These conditions make such

[3] The provision for temporary transfers in the recently amended version of the statute does not differ materially from the existing version. *See* H.R. 820, § 3, 2007-2008 Session (N.C. 2007) (adding § 143-215.22L(q)).

"temporary transfers" sufficiently likely to be authorized during the pendency of this litigation that the threat of irreparable harm to South Carolina from further interbasin transfers is imminent.

2. North Carolina is simply wrong to assert that the interbasin transfers it has authorized thus far have had only insignificant effects. North Carolina attempts to make that showing by pointing out that the most recent transfer it authorized of 10 mgd to Concord and Kannapolis constitutes "less than 0.4% of the average daily flow of the river into South Carolina." NC Prelim. Inj. Opp. at 3. North Carolina is thus claiming an "average daily flow" of more than 3,800 cubic feet per second ("cfs"). Yet, as South Carolina has alleged here, the "average" flow of the Catawba River masks wide fluctuations — due to both drought and non-drought causes of inadequate flow, *see* SC App. 16 (Badr Aff.) — when the flow of the Catawba River is far less than average. In times of extreme drought, flows have dropped as low as 132 cfs. *See* SC App. 21 (Badr Aff.). Indeed, the minimum daily average flow measured for each day of the year for the Catawba River between 1942 and 2006 was typically as low as 500-700 c.f.s. *See id.* Those historical patterns are critically important in light of North Carolina's existing authorized transfers. As North Carolina's Morris Declaration makes clear, to date North Carolina has authorized the transfer of at least 72.5 mgd (approximately 116 cfs) out of the Catawba River.[4] In times of extreme drought when the river is in a flow of less than 500 cfs, such transfers in North

[4] South Carolina alleged in its complaint that North Carolina had authorized the transfer of at least 48 mgd from the Catawba River, based on its information that, in addition to the 43 mgd North Carolina has authorized through the permit process established by the interbasin transfer statute, transfer of at least 5 mgd was grandfathered by the statute. *See* Compl. ¶¶ 20-21. North Carolina's Morris declaration makes clear, however, that an additional 24.54 mgd was grandfathered by the interbasin transfer statute, *see* N.C. App. 49a, for a total of 72.54 mgd that North Carolina has authorized to be transferred from the Catawba River. The harms identified by South Carolina are therefore even greater than originally understood.

Carolina would represent nearly 25% of the flow of the river — an extraordinary amount that can cause devastating effects of the types described in South Carolina's complaint and motion papers. *See* Compl. ¶ 17; SC Br. at 5-6; Application at 2-3, 5-6. Thus, when it matters most to South Carolina, North Carolina's authorized interbasin transfers are by no means insubstantial. As this Court has stressed, "Can it be gravely contended that there are no preventive remedies, by way of injunction or otherwise, against injuries not inflicted or experienced, but which would appear to be the natural result of acts of the defendant, which he admits or avows it to be his intention to commit?" *Missouri v. Illinois*, 180 U.S. at 243.

* * *

South Carolina is likely to succeed on the merits of its claim that an equitable apportionment is warranted and that North Carolina has no right under federal law to divert substantial portions of the Catawba River in a manner that unfairly diminishes South Carolina's equal rights in the river. South Carolina will suffer irreparable harm in the absence of an injunction, as North Carolina has plainly threatened additional unilateral and unlawful interbasin transfers from the Catawba. Moreover, if North Carolina truly does not contemplate authorizing any additional interbasin transfers in the next two years (as it suggests might be possible), North Carolina will suffer no harm whatsoever from the limited injunction that South Carolina seeks. Indeed, the Court need do nothing more than to hold North Carolina to its representation that, "[i]n fact, the status quo will be maintained for at least the next two years." NC Prelim. Inj. Opp. at 5. During that time, the parties may develop a full record before a Special Master, and the Special Master's recommendations may be reviewed by this Court.

Conclusion

For the foregoing reasons and those stated in the application, South Carolina respectfully requests the issuance of a preliminary injunction enjoining North Carolina, absent permission from a Special Master appointed by this Court, from authorizing transfers of water from the Catawba River in excess of those authorized as of the date of the application, thereby preserving the status quo pending resolution of the related original action filed by South Carolina contemporaneously with the application.

Respectfully submitted,

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Counsel for the State of South Carolina

August 22, 2007

Interbasin Transfer Certification Status for the Union County

Union County has submitted in February 2005 a draft Environmental Impact Statement (EIS) for a new water reclamation facility and the associated increase in interbasin transfer from the Catawba River Basin to the Rocky River Subbasin. According to the EIS, the proposed interbasin transfer certificate would increase from the currently 5 million gallons per day (mgd) grandfathered amount to an 18 mgd transfer.

- Background Documentation

1. *Draft Environmental Impact Statement for the Northern Union County Water Reclamation Facility and Increase in Interbasin Transfer of Water from the Catawba River Basin to the Rocky River Subbasin (pdf format)* (February 2005)

If you would like to be included on the Division of Water Resource's mailing list to receive information relating to Interbasin Transfers and the Environmental Management Commission's Water Allocation Committee meetings, please click on the link below to send an e-mail request to join the list.
Join the Water Allocation Committee mailing list: join-water_allocation_committee@news.ncwater.org

If you have any questions or comments contact Phil Fragapane at Phil.Fragapane@net or call (919)715-0389.

NC Division of Water Resources, DENR - 1611 Mail Service Center - Raleigh, NC 27699-1611
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Last Modified: 04.13.2005

IN THE

Supreme Court of the United States

No. 138, Original

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Bill of Complaint

ANSWER

Duke Energy Carolinas, LLC ("Duke") files the following answer to the Complaint filed by the State of South Carolina:

1. Admitted.

2. Admitted that the Catawba River is essential as set forth in the first sentence of this paragraph. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

3. Admitted that North Carolina enacted an interbasin transfer statute in 1991. That statute has since been repealed and a different one adopted. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

4. Duke lacks sufficient knowledge to admit or deny the allegations in this paragraph.

5. Admitted.

6. This paragraph states a legal conclusion that Duke is not required to admit or deny.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Duke lacks sufficient knowledge to admit or deny the allegations in this paragraph.

13. Duke lacks sufficient knowledge to admit or deny the allegations in this paragraph.

14. Admitted that a multi-stakeholder negotiation process occurred involving Duke and groups from North and South Carolina, and that the negotiations resulted in an agreement about the minimum continuous flow into South Carolina from the Catawba River. Denied that the Federal Energy Regulatory Commission was a stakeholder in this process. Denied that 1,100 cubic feet per second was agreed to be the minimum continuous flow that South Carolina should receive. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

15. Admitted that the Appendix documents cited support the factual allegations set forth in this paragraph. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

16. Admitted that Duke has developed a model to estimate the flow of the Catawba River. Duke denies the characterizations of the model and what it shows on the ground that they are incomplete.

17. Admitted that the Catawba River has been subjected to prolonged droughts. Duke lacks sufficient knowledge to admit or deny the remaining allegations of this paragraph.

18. Admitted that North Carolina enacted an interbasin transfer statute in 1991. That statute has since been repealed and a different one adopted. Duke lacks sufficient knowledge to admit or deny the remaining allegations of this paragraph.

19. Denied. The statute referred to has been repealed and a new interbasin transfer statute has been enacted. Duke states that both the statute described in this paragraph and the new statute speak for themselves, and therefore that Duke is not required to admit or deny the allegations in this paragraph.

20. Admitted that the North Carolina EMC granted the permits described in this paragraph. Duke lacks sufficient knowledge to admit or deny the remaining allegations of this paragraph.

21. Duke states that the first sentence of this paragraph states a legal conclusion that Duke is not required to admit or deny. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

22. Duke lacks sufficient knowledge to admit or deny the allegations of this paragraph.

23. Duke lacks sufficient knowledge to admit or deny the allegations of this paragraph.

24. Duke lacks sufficient knowledge to admit or deny the allegations of this paragraph.

25. Duke states that this paragraph states a legal conclusion that Duke is not required to admit or deny.

26. Duke states that the documents described in this paragraph speak for themselves and therefore that Duke is not required to admit or deny the allegations in this paragraph.

27. Duke states that the documents described in this paragraph speak for themselves and therefore that Duke is not required to admit or deny the allegations in this paragraph.

28. Admitted that the application for a transfer was granted in part. Duke states that the documents described in this paragraph speak for themselves and therefore that Duke is not required to admit or deny the remaining allegations in this paragraph.

29. Admitted that the EMC did not act as recommended in the resolution described. Duke states that the documents described in this paragraph speak for themselves and therefore that Duke is not required to admit or deny the remaining allegations in this paragraph.

FIRST AFFIRMATIVE DEFENSE

Duke's current FERC License, application for New License, Comprehensive Relicensing Agreement, which is a part of Duke's application, and the New License to be issued, including their terms involving minimum flow requirements, and other interests governed by the Federal Power Act must be given significant weight in equitably apportioning the waters of the Catawba River between North and South Carolina.

WHEREFORE, Duke prays:

1. That its interests, including the interests arising out of and related to the FERC License, be protected by any decree of this Court equitably apportioning the Catawba River;

2. That this Court's equitable apportionment of the Catawba River protect Duke's riparian interests in the Catawba River flow and its interests in the excess water created by Duke's impoundments.

3. For such other and further relief as the Court may deem proper.

Respectfully submitted,

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November 30, 2007

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IN THE

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Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

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DUKE ENERGY CAROLINAS, LLC'S MOTION AND BRIEF IN SUPPORT OF MOTION TO INTERVENE AND FILE ANSWER, AND ANSWER

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ANSWER

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IN THE

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DUKE ENERGY CAROLINAS, LLC'S MOTION TO INTERVENE AND FILE ANSWER

On October 1, 2007, this Court granted South Carolina's motion for leave to file a bill of complaint against North Carolina. The action seeks an equitable apportionment of the Catawba River, and a decree enjoining North Carolina's "transfers of water from the Catawba River, past or future, inconsistent with that apportionment." Compl. 10, Prayer for Relief. Pursuant to Supreme Court Rule 17, Duke Energy Carolinas, LLC ("Duke") seeks leave to intervene.

The reasons for Duke's motion are fully set forth in the accompanying memorandum. Briefly, Duke has unique, substantial public and private interests in the flow of the Catawba River in both North and South Carolina that are not represented by either State and that are integrally related to the River's equitable apportionment. For decades, acting prior to

and pursuant to a 50-year license issued in 1958 by the predecessor to the Federal Energy Regulatory Commission ("FERC"), Duke and its predecessor companies have impounded water from the Catawba in 11 reservoirs located in both States to provide hydroelectric power to the region. The terms of Duke's current and future FERC licenses, Duke's interests in the Catawba waters, and the public interests protected by Duke's FERC License under the Federal Power Act are directly implicated in any equitable apportionment.

With reservoirs and facilities located in *both* Carolinas and a FERC License requiring Duke to serve the public interest, Duke's interests are not adequately protected by either State. And, because Duke's interests in the Catawba River are unique, allowing Duke's intervention does not open the door to general intervention.

WHEREFORE, Duke respectfully requests that its motion to intervene be granted.

Respectfully submitted.

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November 30, 2007

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issues posed by this case.[1] See *Arizona* v. *California*, 460 U.S. 605, 614-15 (1983).

For decades, acting prior to and pursuant to a 50-year license issued in 1958 by the predecessor to the Federal Energy Regulatory Commission ("FERC"), see *Duke Power Co.*, 20 F.P.C. 360 (1958) (order issuing license), Duke and its predecessor companies have impounded water from the Catawba in 11 reservoirs located in both States to provide hydroelectric power to the region. SC App. 14. Both the impounding of water in the reservoirs and the releases of that impounded water play a substantial role in determining the flow of the Catawba River. For example, under its current FERC License, Duke is required to release water to maintain specific flow rates for fishery and other purposes. And, with its application for a new license, Duke has submitted a Comprehensive Relicensing Agreement, negotiated by 70 parties including agencies of North and South Carolina. That Agreement requires Duke, *inter alia*, to maintain significantly increased flow rates during times of normal rainfall and times of drought.

The terms of Duke's current and future FERC licenses are of critical importance to this Court's decision whether and how to equitably apportion the Catawba River. The aim of equitable apportionment is to achieve a just and equitable result through a balancing of costs and benefits. Existing uses of water such as those by Duke and the businesses and

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[1] This Court's Rules indicate that the Federal Rules of Civil Procedure are "guides" to the procedures used in actions within its original jurisdiction. Sup. Ct. R. 17.2. With respect to Fed. R. Civ. P. 24 this Court has made clear that its cases addressing intervention govern, rather than the general jurisprudence interpreting Rule 24. *See Arizona* v. *California*, 460 U.S. 605, 614-15 (1983).

communities dependent on Duke's facilities and operations will play a substantial role in any apportionment analysis. See, *e.g.*, *Colorado* v. *New Mexico*, 459 U.S. 176, 187 (1982) ("the equities supporting the protection of existing economies will usually be compelling"). In addition, the public interests recognized by federal law and protected by Duke's FERC License under the Federal Power Act ("FPA") are directly implicated in any equitable apportionment. See 16 U.S.C. §§ 797(e), 803(a)(1), 808(a). Finally, as an impounder of water, Duke has state-law rights to the excess water obtained by virtue of the impoundment – rights that might be directly affected by an equitable apportionment that requires releases from Duke's reservoirs. See N.C. Gen. Stat. § 143-215.44(a).

With reservoirs and facilities located in *both* Carolinas, Duke's interests are not adequately protected by either State's interest in obtaining a larger portion of the Catawba. Nor are Duke's interests wholly private; by virtue of its FERC License, Duke serves numerous public interests protected by federal law as well as its own interests. Indeed, Duke currently has a strong and unique interest in defending the lawfulness of the conditions set forth in the Comprehensive Relicensing Agreement negotiated among 70 stakeholders in the Catawba River basin to support Duke's application for a new 50-year FERC License. Finally, because Duke's interests in the Catawba River are unique, allowing Duke's intervention does not open the door to intervention by any citizen who asserts merely an economic interest in the Catawba. For these reasons, Duke respectfully requests that its motion to intervene be granted.

STATEMENT

1. Duke will not repeat the Statements of North and South Carolina that set forth in detail the importance and historic development of the Catawba River basin in both States, and the origins of this original action. Instead, this Statement will provide only the background essential to Duke's motion to intervene.

Commencing in the early 20th century, Duke's predecessor, which later became known as Duke Power Company, was founded to provide electric power in the Piedmont region. In 1958, the Federal Power Commission issued to Duke Power Company a 50-year license under Section 4(e) of the Federal Power Act "for the construction, operation and maintenance" of hydroelectric facilities along the Catawba River in North and South Carolina that constitute Project No. 2232 ("the Project"). The License was expressly made "subject to the terms and conditions of the Act" and "to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act." 20 F.P.C. at 368. The License also required Duke to maintain and grant passage over Duke property to permit public access to each lake created by the Project, *id.* at 370-71. Finally, the License required Duke to make certain minimum water releases at each development in North and South Carolina, as set out in the License, for purposes specified and in consultation with relevant State agencies. *Id.* at 371-72. (For example, the required minimum average daily flow from Wylie dam, releasing water into South Carolina, is 411 cubic feet per second ("cfs"). NC App. 58a.) Duke's License is due to expire in 2008.

Duke has operated under this FERC License for almost 50 years. As noted above, today Duke has 11 reservoirs along the Catawba, six in North Carolina, four in South Carolina, and one at Lake Wylie on the border between the two States. The reservoirs allow Duke both to generate hydroelectric power at 13 hydroelectric generating plants and to supply cooling water for its nuclear power and coal-fired plants in the Catawba basin. Duke's hydroelectric plants effectively control the flow of the Catawba River; more specifically, the reservoir at Lake Wylie is the source of the Catawba water that flows into South Carolina. NC App. 4a-5a.

In February 2003, Duke began preparations for applying to FERC for the relicensing of its Project. As North Carolina's brief and declarations explain, Duke sought to include all relevant state and private parties to create a consensus around the terms for obtaining its new license. See NC Br. 2-3. Three years of negotiations eventually led to the 2006 Comprehensive Relicensing Agreement ("CRA") signed by Duke, its corporate parent, and 68 other entities, including the North Carolina Department of Environment and Natural Resources, the South Carolina Department of Natural Resources, other state agencies, public water suppliers, county and municipal governments from both States, industries, interest groups, and individuals. See *id.* at 3. The CRA is a formal request to FERC to grant Duke's new License under the terms and conditions set forth in that Agreement. *Id.*; see also NC App. 6a, 57a-58a.

It was time-consuming, expensive, and difficult for all stakeholders in the Catawba River basin to reach agreement on the terms for FERC's issuance of Duke's new License – a license that Duke must obtain in order to continue to conduct its operations

under the FPA. And, many of the provisions of that new License involve factors that, as explained below, are directly relevant to the equitable-apportionment analysis. For example, the CRA would establish the minimum daily flow from Lake Wylie in a variety of settings, from no drought (1,100 cfs) through Stage 1 (860 cfs), Stage 2 (720 cfs), and Stages 3 and 4 (700 cfs) drought conditions. NC Br. 3-4; NC App. 57a-58a, 7a. This would represent a significant increase from the 411 cfs minimum average daily flow required under the current License for fishery and other purposes.

The CRA also establishes a Low Inflow Protocol ("LIP") for entities that use or withdraw water from the Catawba. See NC App. 6a-7a, 58a. The protocol requires certain entities to take increasingly stringent conservation measures as drought conditions become more severe. *Id.*

Duke filed its license application with FERC on August 29, 2006. FERC has not yet ruled on that application. See NC App. 12a, 60a. A ruling is scheduled to be issued before expiration of the current License in August 2008, but may occur some time thereafter. FERC strongly encourages stakeholder settlements such as this CRA, because it allows the parties who represent the interests that FERC must address to recommend a negotiated balance of all relevant interests. If the application for a license is accepted and the terms of the new License go into effect, the issues of equitable apportionment confronting this Court and any Special Master will have to be addressed in the context of the new License's minimum daily flow and other requirements.

Numerous businesses and communities in the Catawba basin now rely on the River and on Duke's

hydroelectric facilities and other operations. All parties agree that the Catawba, including the power generated by Duke's facilities, is critical to the economies and communities of the basin now and for the foreseeable future. All parties further agree that the region has been periodically subject to drought, with damaging consequences for the Catawba's flow. These considerations were crucial in the multi-party negotiations that led to the CRA and its LIP submitted to FERC by Duke. The same considerations will be central to the equitable-apportionment analysis.

2. Although North and South Carolina have long worked out their differences concerning the Catawba River, the severe drought that occurred from 1998 through 2002, and subsequent drought conditions, led to the initiation of this lawsuit. Both North and South Carolina have statutes that permit state agencies to authorize transfers of water from one river basin to another. See N.C. Gen. Stat. § 143-215.22I; S.C. Code Ann. §§ 49-21-10 to -80. North Carolina, through its Environmental Management Commission ("EMC"), has utilized its authority under its Interbasin Transfer Statute to approve transfers of water from the Catawba River to other river basins.

Recently, on January 10, 2007, the EMC granted in part an application for a transfer of water from the Catawba over the objection of South Carolina. SC Br. 7. As detailed in the party States' briefs, this grant led to certain communications between the States, but did not result in negotiations or any other resolution of the disagreement about the Catawba water transfers. On June 8, 2007, South Carolina filed its motion for leave to file the bill of complaint in this case.

In its complaint, South Carolina seeks an equitable apportionment of the flow of the Catawba River and, relatedly, a declaration that North Carolina's transfers of water from the Catawba to other watersheds are unlawful to the extent that they exceed North Carolina's equitably apportioned share, and an injunction prohibiting such transfers. South Carolina is not challenging the lawfulness of North Carolina's Interbasin Transfer Statute *per se*; it is challenging that law only to the extent it is utilized to authorize transfers that result in North Carolina's use of water in excess of its (as yet undetermined) equitably apportioned share of the flows of the Catawba River. Compl. ¶ 4.

This Court granted South Carolina's motion on October 1, 2007. Duke is filing this motion and its proposed answer to the Bill of Complaint within the time that this Court has set for North Carolina to file its answer. Duke seeks to intervene pursuant to Supreme Court Rule 17 because any equitable apportionment of the Catawba River will directly address Duke's current and future uses of the River pursuant to its FERC License, and will directly affect Duke's legal rights and obligations in connection with the waters of that River.

ARGUMENT

INTERVENTION IS WARRANTED BECAUSE DUKE'S UNIQUE INTERESTS IN THE CATAWBA RIVER ARE NOT REPRESENTED BY THE PARTY STATES AND WILL BE DIRECTLY AFFECTED BY ANY EQUITABLE APPORTIONMENT.

This Court has recognized that in specified circumstances, parties other than states and the

United States have a "compelling interest" that is not represented by a party state, and thus should be permitted to intervene in original cases that will directly affect that interest. *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam). This case presents precisely those circumstances. Based on its federally-licensed activities in both States, Duke has a unique amalgam of rights and obligations arising out of the water of the Catawba River that are not adequately represented by either State, and that implicate substantial federal, public and state law interests. These interests would be directly affected by any equitable apportionment of the Catawba River.

A. Duke's Interests Would Be Directly And Materially Affected By Any Equitable Apportionment Of The Catawba River.

In addressing equitable apportionment, this Court applies federal common law. See *Virginia* v. *Maryland*, 540 U.S. 56, 74 n.9 (2003). This Court will make "an informed judgment on consideration of many factors." *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945). This Court's oft-quoted enumeration of apportionment principles provides a sense of the complexity of the inquiry:

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors .... [P]hysical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former – these are all relevant

> factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made. [*Id.*]

Duke's pervasive presence on the River now and for more than 100 years – its facilities, operations and water use – will play a central role in virtually every factor of the equitable apportionment inquiry. Its current and new FERC License will color any assessment of the relative benefits and costs of Duke's water control and usage at multiple locations on the River in order to serve the businesses and communities dependent upon Duke's operations. Duke's public and private interests, in general and at numerous individual locations in both States, are potentially affected by the outcome of any equitable apportionment, and many of the facts relevant to the inquiry involve Duke's present and future uses. These considerations alone warrant intervention.

Finally, although the Court interprets and creates federal common law in apportionment cases, state law does provide a source for principles that the Court uses to craft that common law. See, *e.g.*, *Connecticut* v. *Massachusetts*, 282 U.S. 660, 670-71 (1931) (Court's equitable apportionment is based in part "upon a consideration of the pertinent laws of the contending States and all other relevant facts"). Under North Carolina law, Duke, as an impounder of water, has "a right of withdrawal of excess volume of water attributable to the impoundment." N.C. Gen. Stat. § 143-215.44(a). That right, too, is potentially affected by an equitable apportionment that requires Duke to release excess impounded water. That is a substantial interest unique to Duke that makes intervention particularly appropriate.

In sum, Duke has numerous rights and obligations that will be directly affected by any equitable apportionment of the Catawba. In addition, Duke is uniquely situated to assist the party States and the Court's exploration of all facts relevant to deciding what should be an equitable apportionment.

B. These Interests Strongly Support Intervention.

Duke's legal rights and responsibilities and its real-world role in the Catawba River basin demonstrate its "compelling interest[s]" in this original action, and militate strongly in favor of allowing its intervention under this Court's precedent.

Most notably, in *Arizona* v. *California*, 460 U.S. 605 (1983), this Court permitted Indian tribes to intervene in an original action concerning water rights in the Colorado River basin, even though the United States was already litigating on their behalf. *Id.* at 615. This Court observed that:

> The Tribes . . . ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. . . . .
>
> . . . The Tribes' interests in the waters of the Colorado basin have been and will continue to be determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment. [*Id.* at 614-15.]

Like the intervenor tribes, Duke has rights and obligations in the waters of the Catawba; those rights are conferred by the FERC License, by prior use and by state law, all of which are implicated in the equitable apportionment of the Catawba's waters between North and South Carolina. Indeed, the case for intervention is even stronger here than in *Arizona*

v. *California*. While the tribes' interests were protected by the United States, neither State purports to speak for Duke's interests, which are reflected in its FERC License, its established uses, and its common law and state law rights to certain impounded waters. Compare *Arizona* v. *California*, 530 U.S. 392, 419 n.6 (2000) (denying intervention by lessors of reservation lands because the putative intervenors did not own land or claim water rights in the Indian reservation at issue).[2]

Other instances where this Court has permitted intervention also strongly support granting Duke's motion. In *Maryland* v. *Louisiana*, 451 U.S. 725, 734 (1981), eight states filed an original action against Louisiana, asserting that a tax that it imposed on natural gas brought into the State was invalid. The Court allowed 17 natural gas pipeline companies subject to the tax to intervene, explaining:

> Given that the Tax is directly imposed on the owner of imported gas and that pipelines most often own the gas, those companies have a direct stake in this controversy and in the interest of a full exploration of the issues, we accept the Special Master's recommendation that the pipeline companies be permitted to intervene, noting that it is not unusual to permit intervention of

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[2] As the Court in *Arizona* v. *California* also recognized, when the participation of a private party in an original action does not "enlarge[ ] [the claim of one state against another, there is no Eleventh Amendment bar to the intervention. *See* 460 U.S. at 614. Duke does not seek to bring any separate claim against either State; it seeks simply to represent its own interests in connection with the equitable apportionment claims already made by South Carolina.

private parties in original actions. [*Id.* at 745 n.21.][3]

Thus, this Court allowed intervention even though either of the states challenging the tax might have acted as *parens patriae* and might have represented the pipelines' interests. The critical point appears to have been that the incidence of the tax fell directly on the pipelines, making their interest more compelling than that of any average citizen of an affected state and making their expertise and knowledge valuable to the "exploration" of the issues. The same is true here. For over 100 years, Duke has maintained reservoirs and hydroelectric plants along the Catawba River in both Carolinas, operating under a federal license for nearly 50 years; an equitable apportionment of those waters directly implicates Duke's interests and will require an understanding of extant and future uses, including, critically, Duke's use of the waters under its FERC License.

C. None Of The Usual Bases For Denying Intervention Applies Here.

Duke recognizes that this Court exercises care in authorizing private parties to intervene in original actions. But the reasons for the Court's usual caution are not applicable here. As noted, neither individual State acts as *parens patriae* to Duke. See *New Jersey* v. *New York*, 345 U.S. at 372 (denying Philadelphia's motion to intervene because its interests were already represented by Pennsylvania which was a party); see also *Nebraska* v. *Wyoming*, 515 U.S. 1, 21-22 (1995). Although a sovereign is generally presumed to represent the interests of all its citizens,

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[3] *See also Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922) (granting intervention to private parties whose lands were directly affected by a boundary dispute)

Duke has facilities and interests in both North and South Carolina as well as a federal license that implicates the public interest in both States. Neither State will represent Duke's particular amalgam of federal, state and private interests. Yet Duke's fundamental interests are directly at stake in this litigation.

This Court has also been concerned that the intervention of one entity with an interest in the matter subject to original jurisdiction might open the floodgates to numerous similarly-situated entities. See *Utah* v. *United States*, 394 U.S. 89, 95-96 (1969) (per curiam). Duke's particular interests – arising from its FERC License and the associated federal and public interests, its presence in both States, and its unique role as impounder of substantial quantities of water in both States – ensure that there is no one similarly situated or with comparable interests. And, if the Court were to allow other intervenors, Duke is committed to coordinating with them to reduce any increased litigation burden resulting from the participation of private parties. Duke respectfully submits, however, that the level of illumination it can provide with respect to the facts relevant to equitable apportionment is a benefit that outweighs any incremental burden to the Court from its participation.

Finally, nothing has yet been resolved in this case. Thus, Duke's intervention will not delay the matter or require re-litigation of any issue already decided. See *Arizona* v. *California*, 460 U.S. at 615.

CONCLUSION

For the foregoing reasons, the motion to intervene should be granted.

Respectfully submitted,

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November 30, 2007

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ANSWER

IN THE

Supreme Court of the United States

No. 138, Original

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Bill of Complaint

ANSWER

Duke Energy Carolinas, LLC ("Duke") files the following answer to the Complaint filed by the State of South Carolina:

1. Admitted.

2. Admitted that the Catawba River is essential as set forth in the first sentence of this paragraph. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

3. Admitted that North Carolina enacted an interbasin transfer statute in 1991. That statute has since been repealed and a different one adopted. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

4. Duke lacks sufficient knowledge to admit or deny the allegations in this paragraph.

5. Admitted.

6. This paragraph states a legal conclusion that Duke is not required to admit or deny.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Duke lacks sufficient knowledge to admit or deny the allegations in this paragraph.

13. Duke lacks sufficient knowledge to admit or deny the allegations in this paragraph.

14. Admitted that a multi-stakeholder negotiation process occurred involving Duke and groups from North and South Carolina, and that the negotiations resulted in an agreement about the minimum continuous flow into South Carolina from the Catawba River. Denied that the Federal Energy Regulatory Commission was a stakeholder in this process. Denied that 1,100 cubic feet per second was agreed to be the minimum continuous flow that South Carolina should receive. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

15. Admitted that the Appendix documents cited support the factual allegations set forth in this paragraph. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

16. Admitted that Duke has developed a model to estimate the flow of the Catawba River. Duke denies the characterizations of the model and what it shows on the ground that they are incomplete.

17. Admitted that the Catawba River has been subjected to prolonged droughts. Duke lacks sufficient knowledge to admit or deny the remaining allegations of this paragraph.

18. Admitted that North Carolina enacted an interbasin transfer statute in 1991. That statute has since been repealed and a different one adopted. Duke lacks sufficient knowledge to admit or deny the remaining allegations of this paragraph.

19. Denied. The statute referred to has been repealed and a new interbasin transfer statute has been enacted. Duke states that both the statute described in this paragraph and the new statute speak for themselves, and therefore that Duke is not required to admit or deny the allegations in this paragraph.

20. Admitted that the North Carolina EMC granted the permits described in this paragraph. Duke lacks sufficient knowledge to admit or deny the remaining allegations of this paragraph.

21. Duke states that the first sentence of this paragraph states a legal conclusion that Duke is not required to admit or deny. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

22. Duke lacks sufficient knowledge to admit or deny the allegations of this paragraph.

23. Duke lacks sufficient knowledge to admit or deny the allegations of this paragraph.

24. Duke lacks sufficient knowledge to admit or deny the allegations of this paragraph.

25. Duke states that this paragraph states a legal conclusion that Duke is not required to admit or deny.

26. Duke states that the documents described in this paragraph speak for themselves and therefore that Duke is not required to admit or deny the allegations in this paragraph.

27. Duke states that the documents described in this paragraph speak for themselves and therefore that Duke is not required to admit or deny the allegations in this paragraph.

28. Admitted that the application for a transfer was granted in part. Duke states that the documents described in this paragraph speak for themselves and therefore that Duke is not required to admit or deny the remaining allegations in this paragraph.

29. Admitted that the EMC did not act as recommended in the resolution described. Duke states that the documents described in this paragraph speak for themselves and therefore that Duke is not required to admit or deny the remaining allegations in this paragraph.

FIRST AFFIRMATIVE DEFENSE

Duke's current FERC License, application for New License, Comprehensive Relicensing Agreement, which is a part of Duke's application, and the New License to be issued, including their terms involving minimum flow requirements, and other interests governed by the Federal Power Act must be given significant weight in equitably apportioning the waters of the Catawba River between North and South Carolina.

WHEREFORE, Duke prays:

1. That its interests, including the interests arising out of and related to the FERC License, be protected by any decree of this Court equitably apportioning the Catawba River;

2. That this Court's equitable apportionment of the Catawba River protect Duke's riparian interests in the Catawba River flow and its interests in the excess water created by Duke's impoundments.

3. For such other and further relief as the Court may deem proper.

Respectfully submitted.

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November 30, 2007

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No. 138, Original

In The

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion For Leave To Intervene

MOTION OF THE CATAWBA RIVER WATER SUPPLY PROJECT FOR LEAVE TO INTERVENE AND BRIEF IN SUPPORT OF THE MOTION

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In The

Supreme Court of the United States

No. 138, Original

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

MOTION FOR LEAVE TO INTERVENE

The Catawba River Water Supply Project moves this Court for leave to intervene in the original action brought by South Carolina against North Carolina over equitable apportionment of the Catawba River, for the reasons stated in the accompanying brief in support.

Respectfully Submitted,

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NOVEMBER 30, 2007

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STATE OF SOUTH CAROLINA,

Plaintiff,

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STATE OF NORTH CAROLINA,

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STATEMENT OF FACTS

The Catawba River Water Supply Project ("CRWSP"), a joint venture of units of government of North *and* South Carolina, respectfully seeks leave to intervene in this original action brought by South Carolina against North Carolina over equitable apportionment of the Catawba River.

The two participants in CRWSP are Lancaster County Water and Sewer District ("LCWSD") and Union County ("UC"). LCWSD is a special purpose district organized under the laws of the State of South Carolina to furnish retail water and sewer services within Lancaster County, South Carolina. UC is a unit of local government, organized under the laws of the State of North Carolina, which supplies water and sewer services within its borders.

Although UC and LCWSD are units of government in different states, these two bodies face substantially similar short- and long-term challenges related to water supply. Each shares a border with Mecklenburg County, where the City of Charlotte is located. Mecklenburg County has one of the most rapidly expanding populations and economies in the State of North Carolina. Such growth has spread into UC and LCWSD, and, as a result, both are experiencing a swift and steady increase in population. In fact, UC is the fastest growing county in North Carolina, and the panhandle area of Lancaster County is one of the fastest growing areas in South Carolina. Both LCWSD and UC have engaged in extensive planning and committed considerable capital to address their customers' rapidly increasing demands for a reliable water source of high quality and sufficient quantity that can be economically treated

and then sold to consumers and wholesale purchasers at an affordable rate.

UC first noticed a significant increase in demand for water in the 1980s. Most of the demand was within the Catawba-Wateree Basin, which covers the western part of UC near the City of Charlotte. There was also a smaller increase in demand in the eastern part of UC, which encompasses the Yadkin-Pee Dee and Rocky River Basins. UC found that the Yadkin-Pee Dee River and the Rocky River could not meet these growing demands due to quantity and quality concerns with those sources. In addition, the absence of a dense population in eastern UC made it prohibitively expensive to install a distribution system and construct a water plant on the Yadkin-Pee Dee River and/or the Rocky River. UC determined that it could better serve the water demands of its citizens, including those in the eastern part of UC, through inter-basin transfer of water from the Catawba River. ("Inter-basin transfer" refers to the withdrawal of water from one source basin for consumption in another basin.)

LCWSD came to a similar conclusion. During the late 1980s, LCWSD used a reservoir on Bear Creek as its primary water source. However, problems with the water quality of Bear Creek led the South Carolina Department of Health and Environmental Control ("SC DHEC") to place LCWSD under a consent order to improve the water supply. Had LCWSD continued to rely on Bear Creek as its water source, the cost of correcting the quality problems would have exceeded $1.2 million without any corresponding increase in the quantity available from that source; as a result, customers would inevitably have

seen a rise in rates. LCWSD also anticipated dramatic growth in the panhandle area of Lancaster County, which could not be served from Bear Creek. Due to these problems, LCWSD found it necessary to find an alternative source of water: the Catawba River.

Because both UC and LCWSD intended to use the Catawba River to address their substantially similar problems with existing water sources, in the late 1980s they began negotiating a joint venture that together would provide them with a reliable, long-term water source of higher quality and sufficient quantity to satisfy present and future customer demand. In May 1991, UC and LCWSD created CRWSP. Under the joint venture, UC and LCWSD own a water plant, site piping, and other appurtenances as tenants in common; they also jointly own all other real and personal property of CRWSP. The plant, site piping, and other appurtenances were funded from revenue bonds issued by LCWSD and from general obligation bonds issued by UC. Such bonds have also funded subsequent expansions, which have been overseen and permitted by both States.

CRWSP has its own board, which includes representatives from both LCWSD and UC. Because UC and LCWSD treat CRWSP as a separate entity, CRWSP charges UC and LCWSD for water purchased from the plant. CRWSP has its own budget, revenues, expenses, income statement, balance sheet, assets, liabilities, and staff.

The CRWSP plant is located on the Catawba River in Lancaster County, South Carolina, but it is regulated by both States. For example, SC DHEC

granted permits to connect the plant both to LCWSD's existing water transmission lines and to UC's water transmission line at the boundary between North and South Carolina. On the other side of the border, the North Carolina Department of Environment and Natural Resources ("NC DENR") granted permits for UC's North Carolina infrastructure to complete the transfer of water from the CRWSP plant. CRWSP also complies with both the North and South Carolina Freedom of Information and procurement requirements.

CRWSP is permitted to produce 36 million gallons of water per day from the Catawba River. This withdrawal represents the second largest water intake from the Catawba River, behind only Charlotte-Mecklenburg Utilities.

Through CRWSP, both LCWSD and UC provide retail water services to their customers. CRWSP also allows LCWSD to supply wholesale water services to Mecklenburg County, North Carolina; Chesterfield and Kershaw Counties, South Carolina; the City of Lancaster, South Carolina; and the Towns of Kershaw and Heath Springs, South Carolina. In turn, UC supplies wholesale water services to the City of Monroe, North Carolina.

For the last 16 years, CRWSP has been a successful example of inter-governmental cooperation between governmental units from different states. Such inter-governmental cooperation has facilitated economic growth in the Charlotte region.

PROCEDURAL BACKGROUND

On June 7, 2007, the State of South Carolina filed with this Court a Complaint, Brief in Support of Motion for Leave to File a Complaint, and Application for Preliminary Injunction. These papers asserted that existing inter-basin transfers of water in North Carolina from the Catawba River are inequitable and that any such existing or future transfers of water should be enjoined. (S.C. Compl. ¶¶ 3-4.) South Carolina specifically identified UC as an example of an inequitable inter-basin transferor of Catawba River water. (*Id.* at ¶ 21.) Although South Carolina has acknowledged that UC is permitted to make inter-basin transfers under South Carolina regulations and North Carolina law (S.C. Application for Prelim. Inj. at 2 n.1), South Carolina's prayer for relief requested that North Carolina's inter-basin transfer statute not be used as authority for *any transfer* from the River – including, presumably, transfers by UC through CRWSP. (*Id.* at 10.)

In response to South Carolina's Application for a Preliminary Injunction and Motion for Leave to File a Bill of Complaint, North Carolina has invoked the decisions of its agencies and asserted the right of communities and businesses outside of the Catawba River Basin to withdraw water for consumption in North Carolina. (N.C. Resp. to Application for Prelim. Inj. at 8.) Although CRWSP has not yet seen North Carolina's answer to South Carolina's bill of complaint, it is already evident that North Carolina will invoke its right to withdraw water upstream of CRWSP's intake, which is located in South Carolina. In other words, North Carolina may advocate for a flow rate into South Carolina that does not protect

CRWSP's withdrawal rights or, correspondingly, the rights of UC and LCWSD. North Carolina may also attack the fairness or equity of South Carolina's permits for inter-basin transfers from the Catawba River, including CRWSP's permit.

Thus, through equitable apportionment, both North and South Carolina are likely to invade the rights and interests of CRWSP in the Catawba River.[1]

ARGUMENT

This Court has the power to grant government entities within a state leave to intervene in original actions. *See, e.g., Texas v. Louisiana*, 416 U.S. 965 (1974) (permitting city to intervene). Here, for the reasons given below, allowing CRWSP to participate would be "in the interest of a full exposition of the issues." *Maryland v. Louisiana*, 451 U.S. 725, 745-46 n.21 (1981). Thus, "the just, orderly, and effective determination of [the] issues requires that they be adjudicated in a proceeding in which all the interested parties are before the Court." *United States v. Louisiana*, 354 U.S. 515, 516 (1957).

I. CRWSP HAS A DIRECT AND CONCRETE INTEREST IN THIS ORIGINAL ACTION.

CRWSP has "a direct stake" in any equitable apportionment of the Catawba River, *Maryland v. Louisiana*, 451 U.S. at 745 n.21, and any apportion-

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[1] North Carolina does not oppose CRWSP's intervention. South Carolina does oppose CRWSP's intervention. Unless North Carolina's answer strongly contravenes CRWSP's rights and interests in the Catawba River, CRWSP seeks to intervene as a party-defendant.

ment accomplished without its participation "may as a practical matter impair or impede [its] ability to protect that interest." FED. R. CIV. P. 24(a)(2).[2] This Court has regularly granted leave to intervene when an original action directly implicates the concrete interests of a non-party.

For example, in *Arizona v. California*, 460 U.S. 605 (1983), a number of Indian tribes moved to intervene in a dispute between several southwestern states regarding the apportionment of water from the Colorado River. This Court found that intervention was appropriate in part because the tribes had a direct interest in receiving a fair share of water rights from the river. *Id.* at 614-15. Similarly, in *Texas v. New Jersey*, 379 U.S. 674 (1965), which involved a dispute over which state had jurisdiction to escheat intangible personal property, the Court permitted Florida to intervene because it asserted a right to escheat a portion of the property in dispute. Tellingly, the Court denied Illinois leave to intervene because it "claim[ed] no interest in the property involved in this case." *Id.* at 677 n.6. Finally, in *Maryland v. Louisiana*, the Court permitted private pipeline companies to intervene in an original action by several states concerning Louisiana's imposition of a "first use" tax on natural gas. 451 U.S. at 745 n.21. The Court found intervention appropriate because the tax was

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[2] Although the Federal Rules of Civil Procedure do not directly govern intervention in this Court, they do serve as "a guide to procedures in an original action." *Arizona v. California*, 460 U.S. 605, 614 (1983); *see also* RULES OF THE SUPREME COURT OF THE UNITED STATES 17.2 (noting that the Federal Rules "may be taken as guides").

"directly imposed" on those companies, and they therefore had "a direct stake in this controversy." *Id.*

Here, too, any resolution of this original action will directly and concretely affect the interests of CRWSP. As a riparian user of the Catawba River, CRWSP has a right to the reasonable use of river water for beneficial purposes. *See White's Mill Colony Inc. v. Williams*, 609 S.E.2d 811, 817 (S.C. Ct. App. 2005) (citing *Lowe v. Ottaray Mills*, 77 S.E. 135, 136 (S.C. 1913)); *Biddix v. Henredon Furniture Industries, Inc.*, 331 S.E.2d 717, 720-21 (N.C. Ct. App. 1985). A reapportionment of the Catawba River between North Carolina and South Carolina will directly affect the amount of water that CRWSP can withdraw from its intake in South Carolina. As noted above, both UC and LCWSD have relied upon the water supply produced by CRWSP for the last 16 years to support their growing populations and economic base. Moreover, as the history of CRWSP shows, both UC and LCWSD turned to the Catawba River only after other water supply alternatives proved infeasible or insufficient. Thus, any change in the amount of Catawba River water that UC and LCWSD can withdraw through CRWSP could seriously and irredeemably affect their ability to support existing uses and sustain development.

Because CRWSP has a direct and concrete stake in this original action, intervention is warranted.

II. CRWSP IS NOT ADEQUATELY REPRESENTED BY EITHER STATE.

As noted above, CRWSP is located in South Carolina and is jointly owned by LCWSD, a resident

of South Carolina, and UC, a resident of North Carolina. However, neither State will adequately represent the interests of CRWSP or, correspondingly, of the two governmental bodies that participate in it. Instead, CRWSP has a "compelling interest in its own right, apart from its interest in a class with all other citizens and creatures of the state." *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

Neither North Carolina nor South Carolina will provide adequate representation because CRWSP's use of water from the Catawba River is undeniably an interstate appropriation that cannot be individually or exclusively attributed to a single resident of either State. CRWSP is jointly owned and represents a regional, interstate hybrid of government entities from both States, governed by regulations from both States. Accordingly, neither State has the exclusive legal ability to treat it as one of its own citizens. This can be seen most easily in the regulations governing the final transfers of water from CRWSP to UC and LCWSD: LCWSD's receipt of this water is governed by South Carolina permits; by contrast, UC's receipt of this water is governed by South Carolina permits until the water reaches the North Carolina-South Carolina border, at which point North Carolina regulations apply.

Because of CRWSP's interstate nature, both States treat CRWSP as an independent and competitive third-party user of the Catawba River. This treatment has continued in this original action. For example, South Carolina specifically cites UC's appropriation of Catawba River water through CRWSP as an inequitable use (S.C. Compl. ¶ 21), even though LCWSD, which is located in South Carolina, is a joint

owner of CRWSP and will be directly affected by any decision restricting UC's right to use the Catawba River. Similarly, North Carolina has indicated an intent to seek a flow rate into South Carolina that will directly affect UC's water supply from CRWSP because the CRWSP plant's intake is located in South Carolina.

This Court has recognized that, when a State asserts an interest that is in conflict with an interest asserted by one of its citizens, the State cannot adequately represent that citizen's interests in an original action. *See Utah v. United States*, 394 U.S. 89, 92 (1969) (noting that private company's "right to intervene . . . had a substantial basis" when it asserted interests to real property against the competing claims of a State). Similarly here, both North Carolina and South Carolina have treated and are continuing to treat CRWSP as a competing and adverse user of the Catawba River. As a result, neither State will adequately represent the interests of CRWSP in this original action.

III. PARTICIPATION BY CRWSP WILL AID THIS COURT'S DECISION.

This Court's established case law requires the consideration of a number of factors to determine the proper equitable apportionment of an interstate river. *See Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945) ("Apportionment calls for the exercise of an informed judgment on a consideration of many factors."); *Colorado v. Kansas*, 320 U.S. 383, 393-94 (1943) ("[I]n determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be

weighed as of the date when the controversy is mooted."). The participation of CRWSP would help this Court properly consider and balance those factors.

One of the most important factors that this Court considers is "the extent of established uses" – *i.e.*, the existing "consumptive use of water in the several sections of the river." *Nebraska v. Wyoming*, 325 U.S. at 618. As this Court has acknowledged, "the equities supporting the protection of existing economies will usually be compelling." *Colorado v. New Mexico*, 459 U.S. 176, 187 (1982) (*Colorado I*). With 36 million gallons of water produced per day, CRWSP has the second largest intake on the entire Catawba River, representing a significant existing and future use that must play a crucial role in this Court's decision. The participation of CRWSP will help this Court properly determine the extent and value of its existing use. CRWSP's participation is especially valuable here because, as described above, CRWSP's use of the Catawba River is highly unusual: it appropriates water for both downstream (LCWSD) and upstream (UC) consumption; it transfers water for use both inside and outside the Catawba River Basin (LCWSD serves the Lynches River Basin; UC serves the Yadkin-Pee Dee and Rocky River Basin); and it distributes water from the South Carolina side of the Catawba River to both South Carolina and North Carolina.

CRWSP's participation will also help this Court conduct the cost-benefit balancing that is at the heart of its equitable apportionment analysis. *See Colorado I*, 459 U.S. at 188 n.13 (considering "whether the benefit to Colorado from the diversion

will substantially outweigh the possible harm to New Mexico"); *Nebraska v. Wyoming*, 325 U.S. at 618 ("the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former"); *Kansas v. Colorado*, 206 U.S. 46, 113-14 (1907) (declining to adjust existing uses after "compar[ing] the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado"). This Court has emphasized that "hard facts, not suppositions or opinions, [must] be the basis for interstate diversions." *Colorado v. New Mexico*, 467 U.S. 310, 320 (1984) (*Colorado II*). Accordingly, this Court generally requires a detailed description of any proposed reapportionment as well as a concrete explanation of the benefits that would accrue. *See Colorado I*, 459 U.S. at 190; *see also Colorado II*, 467 U.S. at 309 (requiring "a State proposing a diversion [to] conceive and implement some type of long-range planning and analysis of the diversion it proposes"). In addition, this Court requires the parties to explain how "reasonable conservation measures," *Colorado I*, 459 U.S. at 190 – *i.e.*, those that are "financially and physically feasible," *Colorado II*, 467 U.S. at 319 (quoting *Wyoming v. Colorado*, 259 U.S. 419, 484 (1922)) – could affect the cost-benefit analysis.

Given its substantial existing and potential future uses and its one-of-a-kind presence on both sides of the North Carolina-South Carolina border, CRWSP is uniquely able to contribute to the Court's cost-benefit analysis. This is especially true here because neither State possesses the concrete data that this Court requires to decide an original action on inter-

state river rights. Instead, that data is in the hands of existing riparian users such as CRWSP.

IV. INTERVENTION WILL NOT PREJUDICE THE PARTIES.

Finally, participation by CRWSP will not prejudice the parties. This original action is currently at an extremely preliminary stage, and fact-finding by the special master has yet to occur. Moreover, allowing CRWSP to participate will not open the door to a large number of other interested parties. CRWSP's interest in this original action is based upon its unique status as a joint venture comprised of units of government on both sides of the North Carolina-South Carolina line. As explained above, due to the hybrid nature of CRWSP, each State is at least potentially opposed in part to CRWSP's withdrawal and/or consumption from the Catawba River. These factors distinguish CRWSP from any other riparian user of the Catawba River that may seek to intervene in this original action. No other entity in either state straddles the North Carolina-South Carolina boundary as CRWSP does, nor does any other entity engage in a joint venture whose use of the Catawba River is opposed to some extent by both States. Thus, allowing CRWSP to participate poses no risk of unduly expanding the number of interested parties in this original action.

CONCLUSION

For the foregoing reasons, CRWSP respectfully asks this Court for leave to intervene in this original action.

Respectfully Submitted,

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No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To Intervene and File Answer

BRIEF OF THE STATE OF SOUTH CAROLINA IN OPPOSITION TO DUKE ENERGY CAROLINAS, LLC'S MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

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INTRODUCTION

South Carolina brings this original action against North Carolina to obtain an equitable apportionment of the Catawba River, which flows from North Carolina into South Carolina. South Carolina alleges that North Carolina has authorized a series of interbasin water transfers from the Catawba River and thereby exceeded its equitable share of the river. South Carolina requests that the Court determine each State's equitable share of the river and enjoin North Carolina from authorizing interbasin transfers and other consumptive uses inconsistent with that apportionment.

Duke Energy Carolinas, LLC ("Duke"), which, pursuant to a license issued by the Federal Energy Regulatory Commission ("FERC"), operates a series of hydroelectric plants at various points along the Catawba River in both States, now moves to intervene. Such intervention is both unprecedented and inappropriate. As this Court has made clear, private parties have no right to intervene in equitable apportionment cases, which involve inherently sovereign functions in allocating trans-boundary river waters for the benefit of *all* citizens in the respective party States. Indeed, Duke cannot point to a single equitable apportionment case where the Court has permitted a private party to intervene.

Duke points to a pending FERC proceeding and the fact that it uses water on both sides of the boundary. Neither argument has merit. As a private entity, Duke has no basis to assert any "public interest" in FERC proceedings or licenses. To the extent Duke has interests stemming from its FERC license to protect, those can be accomplished short of full party status. In any event, by its request to obtain status

as a defendant. Duke perceives that whatever apportionment is awarded to North Carolina would be in its greatest interest. Yet it offers no reason why North Carolina cannot adequately represent that interest. And whatever apportionment South Carolina obtains will inure to Duke's benefit concerning its plants on both sides of the boundary.

What Duke seeks by intervention is something the Court has never countenanced: treating a private user of water the same as a sovereign. Duke cannot meet its heavy burden, therefore, to demonstrate a "concrete" and "compelling interest in [its] own right, . . . which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373, 374 (1953) (per curiam); *accord Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995). And the state-law rights in both States to water usage are adequately protected – as they are for users on either side of the boundary – by both States. *See New Jersey v. New York*, *supra*; *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930). To the extent Duke has factual or technical information and expertise relevant to the resolution of the issues in this case, such information can be obtained through third-party discovery or Duke's participation as an *amicus curiae* at an appropriate stage of the proceeding. Duke can point to no instance in which this Court permitted intervention and full party status in an original action simply because an entity claims to possess relevant information. Accordingly, Duke's motion to intervene should be denied.

ARGUMENT

THE COURT SHOULD DENY DUKE'S MOTION TO INTERVENE

A. Intervention By Private Parties In Original Actions Is Rare And Disfavored

It is fundamental that original actions seeking the equitable apportionment of an interstate stream serve to adjudicate the rights of the party States *as between each other* and not among individual water users within those States. Thus, private water users – even "[l]arge industrial plants which . . . are corporate creatures of the state" and have "substantial" interests in the use of river water – have consistently been held to have no right to intervene in equitable apportionment actions. *New Jersey v. New York*, 345 U.S. at 372-74 (denying Philadelphia's motion to intervene because Pennsylvania represented its interests); *see also United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam).

Indeed, the Court has "said on many occasions that water disputes among States may be resolved by compact or decree *without* the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States." *Nebraska v. Wyoming*, 515 U.S. at 22 (emphasis added); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106-08 (1938); *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932). Against that longstanding rule, Duke's request is unprecedented: Duke cannot cite a single equitable apportionment case in which this Court has allowed a private water user to intervene. *See infra* pp. 11-13.

To overcome this Court's strong presumption against intervention in original actions, Duke ac-

knowledges (at 8-9) that it "ha[s] the burden of showing some compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373. Put differently, Duke must "point out [some] concrete consideration in respect to which the [relevant party State's] position does not represent [Duke's] interests." *Id.* at 374. Duke fails to satisfy that heavy burden.

B. Duke's Interests Are Not "Compelling" And In Any Event Are Adequately Represented By The Party States

Duke relies (at 2-3) on three interests it claims to represent and that purportedly justify its intervention as a party in this original equitable apportionment action: (1) "federal" "public interests" reflected in Duke's FERC license and the Federal Power Act ("FPA"); (2) "[e]xisting uses" of water by both "Duke and the businesses and communities dependent on Duke's facilities and operations"; and (3) Duke's right "as an impounder of water" under a North Carolina statute "to the excess water obtained by virtue of the impoundment." None of those asserted interests comes close to satisfying Duke's heavy burden to persuade this Court – for the first time in history – to permit a private water user to intervene as a party in an equitable apportionment suit.

1. Duke's primary assertion is that its participation will help to protect "the public interests recognized by federal law and protected by Duke's FERC License under the Federal Power Act." Mot. 3; *see also* Mot. 1, 2, 9, 12, 14, 15 (asserting to represent "public" interests). But Duke is not the proper party

to represent "public interests" arising under federal law under this Court's original jurisdiction.

As a publicly held corporation, Duke's duty is to "maximize the return on their shareholders' investments." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-59 (1990). Thus, to the extent Duke advocates interests it has received pursuant to federal law, it does so only as a profit-maximizer – not as a designated representative or agent of the government or laws creating those federal public interests.[1] That fundamental distinction is dispositive of Duke's claim.

In contrast, the United States and FERC advocate and consider a broad array of public interests. For example, under the FPA, before issuing a permit, FERC is obliged to ensure adequate protection of "fish and wildlife," "irrigation, flood control, water supply, and recreational and other purposes." 16 U.S.C. § 803(a)(1). As a private, for-profit corporation, Duke has no such duties. Corporate interests such as those that Duke *does* represent – unlike sovereign interests – are inherently transitory, turning on economic interests that change with different market conditions. What Duke's current managers believe to be an advantageous apportionment of the Catawba River for Duke's own profit-making incentives may not serve the varied needs of both States' citizens well in the long run; yet, by granting party status to Duke, the Court would be creating a dynamic unlike that in any reported equitable apportionment case.

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[1] *Cf. Watson v. Philip Morris Cos.*, 127 S. Ct. 2301, 2307-08 (2007) (rejecting claim that heavily regulated corporation's compliance with federal law deems it to be "acting under" a federal "officer" or "agency").

To the extent the United States wishes to intervene to protect federal interests, this Court has "often permitted the United States to intervene in appropriate cases where distinctively federal interests, best presented by the United States itself, are at stake." *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (allowing permissive intervention based on the "United States' interests in the operation of the [Outer Continental Shelf Lands] Act" and "FERC's interests in the operation of the Natural Gas Act"). Duke can cite no case in which this Court has permitted original action intervention by a private party to represent federal public interests.

Nor is there reason to think that any private interests Duke has by virtue of its license from FERC justifies intervention. North Carolina, on whose side Duke seeks to intervene, has already advanced the same arguments suggested by Duke here. Specifically, North Carolina urges that the proposed Comprehensive Relicensing Agreement ("CRA") terms for renewal of Duke's FERC license are sufficient to protect South Carolina's interests in this original action. *See* NC Opp. 11-17 (filed Aug. 7, 2007). Those are the same terms proposed to FERC on which Duke relies. *See* Mot. 2-3, 5-6. Moreover, § 39.9 of the proposed CRA expressly *disclaims* resolution of the water rights issues raised in this case:

> Water Rights Unaffected – This Agreement does not release, deny, grant or affirm any property right, license or privilege in any waters or any right of use in any waters.

Duke notably does *not* claim that its interests in the proposed CRA differ materially from North Carolina's position in this litigation. Moreover, the FERC proceedings are a matter of public record, and the

parties have brought and will continue to bring the relevant portions of those legal sources to the Court's and the Special Master's attention. Duke has not, however, adduced any concrete dispute as to the meaning of either the CRA (which is currently of no legal effect) or its current license, nor does Duke point out any particular provision of its license or the CRA that is ambiguous, or that it fears will be misconstrued by the party States, a Special Master, or this Court. Thus, the FERC proceedings provide Duke with no basis to intervene.

2. Duke's reliance (at 2-3) on the "[e]xisting uses of water such as those by Duke and the businesses and communities dependent on Duke's facilities and operations" fares no better. In this respect, Duke relies (at 3) on the fact that it has "reservoirs and facilities located in *both* Carolinas." Thus, although Duke acknowledges (as it must) that "a sovereign is generally presumed to represent the interests of all its citizens," Duke claims that "[n]either State will represent Duke's particular amalgam of federal, state and private interests." Mot. 13-14. Duke cites no authority for that "amalgam" theory, and, indeed, it finds no support in this Court's precedents.

As explained above, Duke's so-called "federal" interests concerning the FERC proceeding provide no cause for intervention here. And Duke's "state and private" interests plainly provide no basis for intervention, because such an argument would be invoked by *all* private users of water to justify intervention. But that is precisely what this Court has repeatedly refused to do. Crediting Duke's "amalgam" theory here would be directly contrary to this Court's policy of maintaining "practical limitation[s] on the number of citizens, as such, who would be entitled to be made parties," and ensuring that the Court's original juris-

diction not be "expanded to the dimensions of ordinary class actions" or used to draw the Court into "intramural" disputes over a State's water allocation between users. *New Jersey v. New York*, 345 U.S. at 373.

This Court's precedents make clear that Duke's claimed state-law and private interests are conclusively represented by the respective States.[2] In *Kentucky v. Indiana*, the party States had agreed to an interstate compact to build a bridge across the Ohio River. Indiana citizens sought to enjoin construction of the bridge in Indiana state court, and the resulting delay caused Indiana to breach the compact. After Kentucky invoked this Court's original jurisdiction to seek specific performance, Indiana answered that "[t]he State of Indiana believes said contract is valid" and that the "only excuse" it had for delaying its performance was the state-court litigation its citizens brought. *See* 281 U.S. at 169-71. This Court granted Kentucky's requested relief, including enjoining the Indiana state court litigation, holding that

> [a] State suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens. The appropriate appearance here of a state by its proper officers, either as

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[2] Indeed, Duke points to no concrete interest regarding its North Carolina operations that is not adequately represented by North Carolina, nor does Duke point to any of its interests in South Carolina that South Carolina has failed to defend. To the contrary, South Carolina's brief in support of its motion for leave to file this action expressly alleged (at 1) that North Carolina's interbasin transfers "directly harm South Carolina" by, among other things, "reducing the flow of water available for the generation of hydroelectric power."

> complainant or defendant, is conclusive upon this point.

Id. at 173. Were it "[o]therwise," the Court explained, "all the citizens of both states, as one citizen, voter, and taxpayer has as much right as another in this respect, would be entitled to be heard." *Id.*

This principle forecloses Duke's arguments for intervention. As *Kentucky v. Indiana* makes clear, Duke's own view as to the scope of its state-law rights would have no bearing on the Court's resolution of this case, for the position taken by the party States as to the content of their own law, and Duke's rights thereunder, will be conclusive.

3. That same principle forecloses Duke's reliance on a North Carolina statute permitting the "withdrawal of excess volume of water attributable to the impoundment" of water in a reservoir. *See* Mot. 3, 10 (quoting N.C. Gen. Stat. Ann. § 143-215.44(a)). Duke's argument only reinforces that Duke seeks to raise an intramural issue over how it should fare under the North Carolina statute. As the Court has made very clear, such issues or disputes that a private party has with a State may not be injected into an original action. *See New Jersey v. New York*, 345 U.S. at 373 ("If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth.").

In any event, regardless of what rights North Carolina grants Duke or other water users under its own law, state-law rights cannot trump the federal common law of equitable apportionment. As the Court explained in *Hinderlider*, "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon

which neither the statutes nor the decisions of either State can be conclusive." 304 U.S. at 110. It is thus well-established that the state-law rights of a "private appropriator . . . can rise no higher than those of [the party State], and an adjudication of the [State's] rights will necessarily bind him." *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). Thus, Duke's claimed state-law rights will necessarily rise and fall with the claims of the party States, and Duke has no right to be accorded the full status of a party in a suit brought pursuant to this Court's original jurisdiction in Article III of the Constitution.

Duke also relies on its supposed "unique" status in claiming that allowing it to intervene will not "open the floodgates" to others. Mot. 14. But Duke's reference to the "[e]xisting uses of water such as those by Duke and the businesses and communities dependent on Duke's facilities and operations" (Mot. 2-3) shows that Duke has similar interests to other users of water from the river, which include the various North Carolina municipalities that received interbasin transfers from the Catawba River that South Carolina specifically challenges. Duke's position is further belied by the motion to intervene by the Catawba River Water Supply Project, which makes many of the same arguments advanced by Duke, such as its unique status as an entity with water consumption in both States and its status as a large consumer of Catawba River water. Whatever interest Duke has as a matter of scale will be accommodated in the States' presentations on the various factors guiding equitable apportionment.

C. The Precedents On Which Duke Relies Are Inapposite

Duke relies on three cases, none of which granted intervention to a private party in an equitable apportionment action. Duke is thus mistaken to contend (at 11) that, "[m]ost notably," *Arizona v. California*, 460 U.S. 605 (1983), supports intervention here. In that case, the Court permitted Indian Tribes to intervene in an equitable apportionment action, but only because the Tribes are afforded special protections under federal law. As the Court explained, "the Indians are entitled to take their place as independent qualified members of the modern body politic," and therefore "the Indians' participation in litigation critical to their welfare should not be discouraged." *Id.* at 615 (internal quotation marks omitted); *cf. Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 (1991) ("Indian tribes are sovereigns."). Because of their sovereign status, the Tribes did not have to show that the United States would inadequately represent their interests. *See Arizona v. California*, 460 U.S. at 615 n.5. Duke, of course, is a private-sector utility company, not a sovereign entity, and thus *Arizona v. California* does not support its intervention request. *See* Mot. 8-9 (acknowledging that sovereign entities are treated differently from private parties in original actions).

Duke's reliance on *Maryland v. Louisiana* is no more persuasive. That case did not involve equitable apportionment or water use, but was a constitutional challenge to a "first-use" tax imposed by Louisiana directly on out-of-state exporters of natural gas brought into Louisiana. The Court allowed intervention by the pipeline companies required to pay the tax on the ground that "the Tax is directly imposed on the owner of imported gas and . . . the pipelines

most often own the gas." 451 U.S. at 745 n.21. Because the tax was imposed directly on the pipelines, the pipelines had an interest in invalidating the tax that was independent of the interest and authority of the plaintiff States. Notably, that case did not raise the same floodgates problem that Duke's motion does here. In contrast with the discrete number of pipelines directly taxed that were at issue in *Maryland v. Louisiana*, hundreds – if not thousands – of entities in both States depend on the Catawba River.

With respect to this Court's apportionment of river waters, it is well-settled that "the apportionment is binding upon the citizens of each State and all water claimants," even where the State had granted the water rights before it entered into the compact. *Hinderlider*, 304 U.S. at 106; *see also Nebraska v. Wyoming*, 515 U.S. at 22. Accordingly, Duke's reliance on *Maryland v. Louisiana* is unavailing, as that case has no application to the special circumstances presented by equitable apportionment cases. Indeed, whereas in *Maryland v. Louisiana* the Court noted in passing "that it is not unusual to permit intervention of private parties in original actions," 451 U.S. at 745 n.21, that is plainly not so in equitable apportionment cases, where this Court has repeatedly made clear that individual water users have "no right to intervene in an original action in this Court," *United States v. Nevada*, 412 U.S. at 538.

Finally, *Oklahoma v. Texas*, 258 U.S. 574 (1922), which Duke cites in a footnote, is off point. As a temporary remedial measure in a boundary dispute, the Court in that case appointed a receiver to take possession of certain lands and "to control or conduct all necessary oil and gas operations" pending "the solution of the controversy." *Id.* at 580. The Court also "provided for such interventions in the suit as

would permit all possible claims to the property and proceeds in the receiver's possession to be freely and appropriately asserted." *Id.* These circumstances are plainly not analogous here. Moreover, contrary to Duke's suggestion, the Court did *not* allow private parties to intervene as to the merits of the boundary dispute, recognizing that the outcome of the boundary dispute between the States would govern their private property rights.[3]

D. Duke's Interests Can Be Protected In Ways Short Of Full Party Status

Duke contends that it has relevant knowledge and expertise that will be helpful in resolving the issues that will be in play in this case. This Court has never held that mere possession of relevant facts, documents, or knowledge is a proper basis for intervening in an original action; indeed, such a showing would not even suffice under the more lenient rules for intervention set forth in Federal Rule of Civil Procedure 24. The party States, of course, will have access to any such information through third-party

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[3] It bears noting that *Oklahoma v. Texas* was decided at a time when it was unclear whether private parties would be bound by the results of an original action if they were not joined by the plaintiff as party defendants. *See Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (raising but not deciding whether individual water-rights claimants in the defendant State should be joined as party defendants by the plaintiff State). "Not surprisingly, the practice soon developed of joining persons or entities within the defendant state whose claims appeared to be at stake." 4 Robert E. Beck et al., *Waters and Water Rights* § 45.03(b), at 45-20 (1991 ed., 2001 replace. vol.) ("Beck"). In 1932, the Court clarified that an equitable apportionment decree binds the citizens. *See Wyoming v. Colorado*, 286 U.S. at 508-09; *Nebraska v. Wyoming*, 295 U.S. at 43. Since then, "individual water claimants usually have not been joined in equitable apportionment suits." 1 Beck § 45.03(b), at 45-21.

discovery (if necessary). Permitting Duke (or any other water claimant) to intervene with full party status would likely complicate discovery and factual development, as well as lead to more protracted proceedings. Yet, given the current drought conditions in the Catawba River Basin, both States and their water users will benefit from resolution of this matter as expeditiously as possible so that plans for adequate intrastate water allocation can be made accordingly.

Duke cannot demonstrate why participation as an *amicus curiae* would be insufficient to assert its interests. Regardless of what the Special Master were to recommend, Duke would be free to file an *amicus* brief on the merits, either supporting or criticizing the Special Master's report and recommendations. *See* Sup. Ct. R. 37.3; *see also Ohio Bureau of Employment Servs.* v. *Hodory*, 429 U.S. 814 (1976) (denying leave to intervene but granting leave to file *amicus* brief); *Northbrook Prop. & Cas. Ins. Co.* v. *Edwards*, 511 U.S. 1103 (1994) (same). In *New Jersey* v. *Delaware*, No. 134, Original, which directly implicated whether BP plc could build a liquefied natural gas terminal that crossed the state boundary, BP provided third-party discovery in proceedings before the Special Master and then participated formally as an *amicus* on exceptions to the Special Master's report and recommendations. There is no cause to grant Duke the status of a party in an original action, where such actions serve to adjudicate the rights between States, not private parties.

CONCLUSION

Duke's motion for leave to intervene and file answer should be denied.

Respectfully submitted.

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December 11, 2007

No. 138, Original

IN THE
Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff.

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To Intervene

BRIEF OF THE STATE OF SOUTH CAROLINA IN OPPOSITION TO MOTION OF THE CATAWBA RIVER WATER SUPPLY PROJECT FOR LEAVE TO INTERVENE

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INTRODUCTION

This original action by South Carolina against North Carolina seeks an equitable apportionment of the Catawba River, which flows from North Carolina into South Carolina. South Carolina alleges that North Carolina has taken and is taking more than its fair share of the river waters, through a series of interbasin water transfers from the Catawba River. South Carolina requests that the Court determine each State's equitable share of the river and enjoin North Carolina from authorizing interbasin transfers and other consumptive uses inconsistent with that apportionment.

The Catawba River Water Supply Project (the "Project"), a joint venture of two municipalities – the Lancaster County Water and Sewer District, in South Carolina, and Union County, North Carolina – now moves to intervene on the ground that those municipalities' water rights will be "directly affected" by the apportionment in this case. Project Mot. 10. Intervention by the Project is both unprecedented and foreclosed by *New Jersey v. New York*, 345 U.S. 369 (1953) (per curiam), in which this Court held that municipalities may not intervene in equitable apportionment actions because, in such "matter[s] of sovereign interest," the party States "'must be deemed to represent all [their] citizens.'" *Id.* at 372-73 (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930)).

Although the Project emphasizes that it is composed of two municipalities across state lines, municipalities cannot join forces to form a sovereign. Rather, the municipalities are creatures of state law, and any rights they enjoy "can rise no higher than those of [the party State]." *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). The Project, therefore, cannot

demonstrate a "concrete" and "compelling interest in [its] own right, *apart from [its] interest in a class with all other citizens and creatures of the state*, which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373-74 (emphasis added). The Project's motion to intervene should be denied.[1]

ARGUMENT

THE COURT SHOULD DENY THE PROJECT'S MOTION TO INTERVENE

A. The Project's Interests Are Conclusively Represented By The Party States

It is fundamental that original actions seeking the equitable apportionment of an interstate stream serve to adjudicate the rights of the party States *as between each other* and not among individual water users within those States. Indeed, this Court has "said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who none-

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[1] To facilitate the Court's consideration of the Project's motion in tandem with Duke Energy's motion to intervene, South Carolina files this opposition seven days earlier than is required by the Court's rules. Both Duke's and the Project's motions to intervene were filed on November 30, 2007. South Carolina received Duke's motion on December 1 and filed its opposition 10 days later. But South Carolina did not receive the Project's motion until December 10, 2007 – 10 days after it was filed. Accordingly, South Carolina's opposition is not due under the Court's rules until December 20, 2007. *See* Sup. Ct. R. 21.1 (response to motion due "within 10 days of receipt"). Despite having filed its motion with the Court on November 30, 2007, presumably in person, the Project served its motion only by first-class mail. *See* Sup. Ct. R. 29.3 (requiring service "by a manner at least as expeditious as the manner used to file the document with the Court"). A hand-stamped service copy is on file with the Office of the Attorney General.

theless are bound by the result reached through representation by their respective States." *Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106-08 (1938); *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932).

This Court appears never to have permitted a private person or non-sovereign entity, including municipal entities that supply water to local residents, to intervene in an original equitable apportionment action. *See, e.g., Nebraska v. Wyoming*, 296 U.S. 548 (1935) (order denying motion of Platte Valley Public Power & Irrigation District for leave to intervene); *Arizona v. California*, 345 U.S. 914 (1953) (denying motion of Sidney Kartus *et al.* for leave to intervene). Rather, equitable apportionment cases present "matter[s] of sovereign interest," and, as to such matters, it "is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration," that a State "must be deemed to represent all its citizens." *New Jersey v. New York*, 345 U.S. at 372-73 (internal quotation marks omitted). "Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.* at 373.

In *New Jersey v. New York*, the Court denied Philadelphia's motion for leave to intervene, reasoning:

> The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters. If we undertook to evaluate all the

> separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth. Furthermore, we are told by New Jersey that there are cities along the Delaware River in that State which, like Philadelphia, are responsible for their own water systems, and which will insist upon a right to intervene if Philadelphia is admitted. . . . Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions.

Id. (footnote omitted).[2]

Those considerations compel denial of intervention here. The municipalities composing the Project represent only a discrete subset of interests in either State. They compete, within their respective States, for allocation of water *from* each State. This Court has made clear, however, that allocations *within a State* are necessarily constrained by the apportionment decrees dividing river water *between States*. *See Hinderlider*, 304 U.S. at 106 (holding that an "apportionment [by this Court] is binding upon the citizens of each State and all water claimants," even where the State had previously allocated state-law water rights among individual claimants); *see also Nebraska v. Wyoming*, 515 U.S. at 22. Thus, as to the equitable share between the party States, municipalities' rights – regardless of their authority granted under state law – "can rise no higher than

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[2] The Court denied Philadelphia's motion to intervene despite a "Home Rule Charter" granted by the Commonwealth, making "Philadelphia . . . responsible for her own water system." 345 U.S. at 374. As the Court explained, "that responsibility is invariably served by the Commonwealth's position." *Id.*

those of [the party State], and an adjudication of the [State's] rights will necessarily bind [them]." *Nebraska v. Wyoming*, 295 U.S. at 43.

Kentucky v. Indiana, on which the Court relied in *New Jersey v. New York*, is particularly instructive here. *See* 281 U.S. at 173. In that case, the party States had agreed to an interstate compact to build a bridge across the Ohio River. Indiana citizens sought to enjoin construction of the bridge in Indiana state court, and the resulting delay caused Indiana to breach the compact. After Kentucky invoked this Court's original jurisdiction to seek specific performance, Indiana answered that "[t]he State of Indiana believes said contract is valid" and that the "only excuse" it had for delaying its performance was the state-court litigation its citizens brought. *See id.* at 169-71. This Court granted Kentucky's requested relief, including enjoining the Indiana state-court litigation, holding that

> [a] state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens. The appropriate appearance here of a state by its proper officers, either as complainant or defendant, is conclusive upon this point.

Id. at 173. Were it "[o]therwise," the Court explained, "all the citizens of both states, as one citizen, voter and taxpayer has as much right as another in this respect, would be entitled to be heard." *Id.*

The principles set forth in these cases foreclose the Project's arguments for intervention. As *Kentucky v. Indiana* makes clear, the Project's own view as to the scope of its state-law rights – in either State – would have no bearing on the Court's resolution of this case.

for the position taken by the party States as to the content of their own law, and the Project's rights thereunder, will be conclusive. Moreover, the municipalities that compose the Project are by no means unique in their dependence on the Catawba River for water. Indeed, hundreds – if not thousands – of entities in both States depend on the Catawba River, including numerous municipalities. If the Court were to grant the Project's motion, "there would be no practical limitation on the number of [water users], as such, who would be entitled to be made parties." *New Jersey v. New York*, 345 U.S. at 373.

Notably, *both* of the water users that have sought thus far to intervene in this matter have claimed "unique" interests in the Catawba River because they use water on both sides of the boundary. *See* Project Mot. 12 (claiming "one-of-a-kind presence on both sides of the ... border"); Duke Mot. 3 (claiming "unique" interests, among other reasons, because of "facilities located in *both* Carolinas"). Each disproves the other and "demonstrates the wisdom of the rule" against intervention in equitable apportionment actions. *New Jersey v. New York*, 345 U.S. at 373.

B. Two Municipalities Cannot Reach Across State Lines To Create Sovereign Rights

The Project does not argue that either of its member municipalities would itself be permitted to intervene – nor could it. Rather, the Project seeks to avoid the clear force of this Court's precedents by pointing out that its members are from different States. But that does nothing to change the character of the municipalities' inherently state-law interests. Indeed, there is no basis in American law for the proposition that two or more municipalities, by

reaching across state lines in a joint venture, can create rights that are on a par with the sovereign States under whose authority the municipalities exist. The Constitution recognizes that States may enter into legally cognizable compacts with each other – subject to approval by Congress – but municipalities plainly have no such authority on their own. *See* U.S. Const. art. I, § 10, cl. 3 ("[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State").

Indeed, that the Project is a cross-boundary joint venture between local municipalities only amplifies the reasons for denying intervention. Rather than being drawn into a potential intramural dispute over water use between *one* State and its municipality, intervention here would effect that result in *two* States. Moreover, the Project itself consists of municipalities that may have differing interests even among themselves because they are located in different States; if the Project is permitted to intervene and takes a position that either of its members disagrees with, then the Court could be faced with yet another motion to intervene from either or both of those municipalities to set the record straight. There is no precedent at all for permitting intervention by municipalities or private water users, and allowing it here would open up the floodgates for numerous others to argue for intervention as well – upsetting decades of this Court's settled precedents.

Like Duke, the Project points to *Arizona v. California*, 460 U.S. 605, 614-15 (1983), and *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981), in support of its motion, but those cases – and an additional one the Project cites, *Texas v. New Jersey*, 379 U.S. 674, 677 n.6 (1965) – are inapposite for the reasons set forth at pages 11-12 of South Carolina's opposition to

Duke's motion. Namely, *Arizona v. California* and *Texas v. New Jersey* involved intervention by sovereign or quasi-sovereign entities separate from the original state parties; the municipalities comprising the Project are neither. And *Maryland v. Louisiana*, a tax case, has no application to the special circumstances presented by equitable apportionment cases.

The Project also relies on *Utah v. United States*, 394 U.S. 89 (1969), but the Court there *denied* a private landowner's motion to intervene. Although the Court noted, in a dictum, that, on facts not presented in that case, the private landowner's motion "would have had a substantial basis," *id.* at 92, the Court did not state that it would have granted that motion. In any event, *Utah v. United States* was not an equitable apportionment case.

C. The Project's Interests Can Be Protected In Ways Short Of Full Party Status

Like Duke, the Project contends that it has relevant knowledge and expertise that will be helpful in resolving the issues that will be in play in this case. As set forth in South Carolina's opposition to Duke's motion at pages 13-14, mere possession of relevant information is not a proper basis for intervention, and the party States will have access to any such information through third-party discovery in any event. Furthermore, the Project, like Duke, cannot demonstrate why participation as *amicus curiae* would be insufficient to assert its interests. *See id.*

CONCLUSION

The Catawba River Water Supply Project's motion for leave to intervene should be denied.

Respectfully submitted.

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December 13, 2007

No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion For Leave To Intervene

REPLY BRIEF IN SUPPORT OF THE MOTION OF THE CATAWBA RIVER WATER SUPPLY PROJECT FOR LEAVE TO INTERVENE

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ARGUMENT

The Catawba River Water Supply Project ("CRWSP") has "a direct stake" in the equitable apportionment of the Catawba River. *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). South Carolina does not and cannot dispute that any decision by this Court about how much water must cross the North Carolina-South Carolina border "will directly affect the amount of water that CRWSP can withdraw from its intake in South Carolina" for consumption in both North and South Carolina. CRWSP Mot. 8. The amount of CRWSP's withdrawal, in turn, will affect the thousands of citizens in both States who for nearly two decades have relied upon CRWSP to cost-effectively deliver clean, high-quality water for their daily use. Rather than contest this direct, bi-State interest of CRWSP, South Carolina raises a number of other arguments against CRWSP's intervention, which either miss or attempt to deflect CRWSP's interests. None of these arguments has merit.

Contrary to South Carolina's principal assertion, there is no special rule applicable only to equitable apportionment cases that precludes intervention by non-states. *Contra* S.C. Opp. 2-4. South Carolina cites no authority for that proposition beyond the generalized truism that equitable apportionment cases implicate states' sovereign interests. *All* original actions, by their nature, implicate sovereign interests, yet this Court's precedents firmly establish that intervention is permitted in appropriate circumstances. The fact that intervention by a non-state in an equitable apportionment action has not previously occurred (*id.* at 3) is coincidental, not precedental,

and no doubt reflects the fact that there are relatively few such cases and still fewer entities that meet the criteria for intervention as CRWSP does.

This Court's articulation of the intervention standard in equitable apportionment cases presumes that intervention by non-states will be appropriate under the right circumstances. *See, e.g., New Jersey v. New York*, 345 U.S. 369, 373 (1953) (noting that intervention by a non-state is appropriate if the intervenor "show[s] some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state"). Furthermore, this Court applies the same standard for intervention in an original action whether or not equitable apportionment is at issue. *See, e.g., id.* at 374 (water rights case); *Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930) (non-water rights case). And previous cases have permitted both private persons and "non-sovereign entities" to intervene under that standard, even when their states are also litigants. *See, e.g., Texas v. Louisiana*, 426 U.S. 465, 466 (1976) (per curiam) (in a boundary dispute case between Texas and Louisiana, noting that "[t]he city of Port Arthur, Tex., was permitted to intervene for purposes of protecting its interests").

Further, the criteria employed in the equitable apportionment determination reinforce the merit of allowing those who meet the standard to intervene. This Court's decisions placing a heavy emphasis on "the extent of established uses," *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945), take into account not merely the sovereign interests of the states but also the interests of non-states in deciding how to appor-

tion the water from an interstate river. *See, e.g.*, *Colorado v. New Mexico*, 467 U.S. 310, 319-20 (1984) (extensively discussing uses by the Colorado Fuel and Iron Steel Corp. and the Vermejo Conservancy District).[1]

Given that the criteria for intervention apply equally to an equitable apportionment case, the incontrovertible, unique bi-State interests of CRWSP are dispositive. The circumstances justifying intervention exist here because neither South Carolina nor North Carolina represents the bi-State interests of CRWSP. CRWSP is a joint venture by the Lancaster County Water and Sewer District ("LCWSD") in South Carolina and Union County ("UC") in North Carolina.[2] The CRWSP plant withdraws water from the South Carolina side of the Catawba River, a substantial portion of which is piped upstream to UC on the North Carolina side, where it is consumed both within and without the Catawba River Basin, a water use that South Carolina squarely attacks in this case. Both North Carolina and South Carolina have interests antagonistic to parts of this exchange: North Carolina's interest in maximizing its withdrawal from the Catawba River north of the state line directly conflicts with CRWSP's interest in withdraw-

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[1] Because state sovereignty is not a prerequisite to intervention, South Carolina's contention that CRWSP's rights are not "on a par with the sovereign States" (S.C. Opp. 7) is beside the point. What is relevant for this Motion is that CRWSP is a public entity that represents the public interests of citizens from both States, and not the interests of one State exclusively.

[2] South Carolina repeatedly refers to LCWSD and UC as "municipalities." In fact, LCWSD is a South Carolina special purpose district, while UC is a North Carolina county.

ing water in South Carolina; while South Carolina's interest in reserving water for its own citizens' use opposes CRWSP's interest in piping water upstream to North Carolina.

It is plainly wrong for South Carolina to contend that it can or will represent CRWSP's interests in withdrawing, treating, and transferring water to UC for consumption in North Carolina, the uninterrupted continuation of which enables the operational economies of scale that both joint venturers, LCWSD and UC, are able to pass through to their ratepayers. South Carolina has made clear that it vehemently opposes CRWSP's facilitation of UC's consumption in North Carolina by inter-basin transfer. For its part, North Carolina does not oppose CRWSP's intervention, no doubt because it recognizes CRWSP's uniquely regional interests, which it does not suggest it can adequately represent. South Carolina's transparent motivation in opposing intervention is to keep CRWSP out of the case while it secures a ruling that binds CRWSP.

This antagonism is not hypothetical. South Carolina specifically cites UC's inter-basin transfer of water from CRWSP as an inequitable use (S.C. Compl. ¶ 21), despite the fact that the transfer occurs through a joint venture in which LCWSD, a South Carolina resident, also has a substantial interest, and despite the fact that South Carolina previously authorized the transfer (N.C. Answer ¶ 21). On the other side, North Carolina has expressed a clear intent to preserve as many of its existing withdrawals as it can (N.C. Answer ¶ 4), even though one of its counties, UC, depends upon CRWSP's intake in South Carolina.

Thus, South Carolina is simply incorrect when it asserts that the joint owners of CRWSP "compete, within their respective States, for allocation of water *from* each State." S.C. Opp. 4. Instead, CRWSP's joint owners compete against *both* States for the right to use the Catawba River. It will be too late for CRWSP to defend its interests adequately if it must first wait for North Carolina and South Carolina to resolve their own dispute. There is every reason to believe that, by that time, both CRWSP's intake from South Carolina and its transfer to North Carolina will have been substantially (and, given each state's antagonism, detrimentally) decided.

South Carolina contends that CRWSP's intervention would "open up the floodgates for numerous others to argue for intervention as well" (S.C. Opp. 7) because "hundreds – if not thousands – of entities in both States depend on the Catawba River, including numerous municipalities" (*id.* at 6). In fact, none of those other entities straddles the North Carolina-South Carolina border as CRWSP does, nor do any of them engage in the unusual upstream (including inter-basin) transfers that set CRWSP at odds with both States.[3]

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[3] Alternative intervenor Duke Energy is a hydro-electric utility, not a publicly owned treatment works, and as such does not engage in the same cross-border and inter-basin transfers that CRWSP does. Because CRWSP is jointly owned by North Carolina and South Carolina entities, inherent in CRWSP's use of the Catawba River is its cross-border and inter-basin transfers of water to areas outside of the Catawba River basin. CRWSP is thus distinct from Duke Energy because, being publicly owned, CRWSP is unquestionably the "proper party" to represent the public interests of its joint owners and their citizens.

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South Carolina also misapprehends CRWSP's unique status in asserting that the "floodgates" will open because CRWSP's intervention may later spur the intervention of LCWSD and UC. S.C. Opp. 7. Although the further intervention of LCWSD and UC would hardly paralyze the Court (*see supra* note 3 (citing original actions where this Court allowed at least three intervenors)), that hypothetical prospect will not come to pass because CRWSP represents both of their interests in this litigation; to the extent that there are any disputes, LCWSD and UC can resolve them *within* the governing structure set up by CRWSP.

Finally, South Carolina argues that CRWSP should be content to serve as *amicus curiae* and not as an intervenor. S.C. Opp. 8. But as a mere *amicus*, CRWSP would be unable to ensure that the factual record reflects its novel bi-State interests, which reside between the States and not exclusively in any one State. Furthermore, because both States oppose CRWSP's existing use of the Catawba River, neither will have an interest in using "third-party discovery" (S.C. Opp. 8) or any other means to advance and secure CRWSP's position before the Special Master.

Cf. S.C. Opp. to Duke Mot. 4-5. In any event, even assuming that CRWSP's and Duke Energy's multi-state interests can be compared, their dual intervention will not disrupt the orderly disposition of this matter. *See, e.g.*, *Maryland v. Louisiana*, 451 U.S. at 745 n.21 (allowing 17 private pipeline companies to intervene); *Arizona v. California*, 460 U.S. 605, 613-14 (1983) (allowing five Indian tribes to intervene); *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (allowing "[n]umerous [private] parties" to intervene).

CONCLUSION

For the foregoing reasons, as well as the reasons stated in its original Motion and Brief in Support, CRWSP respectfully asks this Court for leave to intervene in this original action.[4]

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DECEMBER 14, 2007

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[4] In response to footnote 1 of South Carolina's Opposition, CRWSP has confirmed with Wilson-Epes Printing that they properly filed and served the Motion to Intervene. Any delay was attributable to the U.S. mail. In addition, South Carolina was advised in advance of CRWSP's intention to move to intervene, and the Motion was, of course, noted on the Court's docket.

No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Bill of Complaint

DUKE ENERGY CAROLINAS, LLC'S REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE AND FILE ANSWER

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Duke Energy Carolinas LLP states that it is a wholly owned subsidiary of Duke Energy, Corporation. No publicly held company owns 10% or more of its stock.

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INTRODUCTION AND SUMMARY OF ARGUMENT

South Carolina's brief in opposition to Duke Energy Carolinas LLP's ("Duke's") motion to intervene rests on three false premises: (i) that Duke's interests are the same as those of any citizen utilizing the Catawba River; (ii) that Duke's interests in the River are cumulatively represented by North and South Carolina (even though those interests are clearly adverse to each other); and (iii) that Duke's interests are solely private and profit-maximizing and thus outside of the realm of interests relevant to the equitable-apportionment analysis. In fact, Duke's pervasive, controlling and wholly unique interests in the Catawba River waters arise from its Federal Energy Regulatory Commission ("FERC") License, which, along with its status as a public utility, ensures that Duke operates in the public interest as defined by federal law.

In addition, with reservoirs, customers, and legal rights and obligations in both North and South Carolina, Duke is *not* interested in maximizing the water available to *either* State. Its interest is in fulfilling the terms of its current FERC License and in ensuring the integrity of the Comprehensive Relicensing Agreement ("CRA") negotiated by Catawba stakeholders in both States – an Agreement that is critical to Duke's effort to obtain a new 50-year license from FERC and that requires Duke to act in the public interest in numerous respects.[1]

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[1] Portions of the massive CRA are appended to N.C.'s brief in opposition to the motion for leave to file bill of complaint. Duke would be glad to provide the document on CD or in hard copy if the Court wishes to review the entire document.

South Carolina's characterization of Duke as akin to any private user of the Catawba River is, accordingly, astounding. For more than 50 years, Duke has impounded water from the Catawba in 11 reservoirs located in North and South Carolina to provide hydroelectric power throughout the region. These impoundments regulate and determine the flow of the Catawba River. In times of drought, the natural flow of the Catawba would result in only a trickle of water reaching South Carolina. There would be *no water to apportion* absent Duke's FERC-licensed dams and reservoirs. See, *e.g.*, NC App. 13a, 14a-15a. South Carolina, accordingly, is seeking the apportionment not of the natural flow of the Catawba River, *but of waters available solely because they have been impounded by Duke's operation of its Catawba-Wateree project pursuant to the terms of a FERC license issued under the Federal Power Act* ("FPA"). Equally to the point, the FPA and Duke's FERC License require that Duke operate the project *in the public interest as defined by the federal government through FERC*. No other Catawba user and neither State has any remotely equivalent interest in the Catawba waters and their use in the public interest as defined by federal law.

These are precisely the unique circumstances that warrant intervention under this Court's precedent. Like the tribes permitted to intervene in *Arizona* v. *California*, 460 U.S. 605 (1983), Duke has interests that are unique, concrete, substantial and federal in nature, specifically the public interest requirements embodied in its license as mandated by the FPA and FERC. And, Duke's interests here are directly analogous to those of the oil pipeline companies permitted to intervene in an original action because the unconstitutional tax fell directly upon them, see

Maryland v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981). The equitable apportionment of the impounded waters of the Catawba has a direct effect on Duke and its operations, and Duke unquestionably should participate in developing, either through litigation or negotiation, any remedy imposed or approved by this Court. Duke's interest is unlike that of any other entity.

Finally, and in light of the foregoing, South Carolina's mantra – that this Court has never permitted a private party to *intervene* in an *equitable apportionment* case – is empty. There is nothing unique about apportionment cases. This Court is generally reluctant to allow private parties to intervene in original actions, which inherently involve sovereign functions. Nonetheless, the Court certainly has allowed parties other than States to join in equitable apportionment cases litigated under the Court's original jurisdiction. See *infra* at 14-16. What is important is not whether the issue arises as a matter of intervention or joinder, but rather whether the private parties' participation will advance the efficiency and effectiveness of the litigation under this Court's standards. Duke comfortably fulfills those criteria.

ARGUMENT

THIS COURT SHOULD GRANT DUKE'S MOTION TO INTERVENE

A. Duke's Interests Are Compelling, Unique And Unrepresented by Either State.

South Carolina spends several pages demonstrating that intervention by private parties in original actions is unusual, requiring the putative intervenor

to show "'some compelling interest in [its] own right apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by this state.'" Opp. 4 (alterations in original) (quoting *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953)). Duke has no quarrel with this standard, but it has clearly made the required showing.

Duke is not equivalent to "'[l]arge industrial plants'" or to a municipality located in a single state, or to other individual claimants within states seeking special recognition for their particular uses, as South Carolina insinuates (Opp. 3 (alteration in original)). Duke's interests in the Catawba, indeed, are exceptional even among FERC licensees. The Catawba-Wateree project is massive, including 11 reservoirs and numerous hydroelectric facilities throughout the River basin that runs through two States. And, Duke plainly is not just a very *large* user, as South Carolina implies. The very nature of its use and interest is both unique and uniquely important.

1. Duke's Obligations To Serve The Public Interest In Numerous Respects Arise From Its Status As A Federal Licensee.

South Carolina acknowledges that under the FPA, FERC is obligated to consider a broad array of public interests in issuing a license. Opp. 5. But, South Carolina insists, this is of no relevance to Duke, which "has no such duties" and acts based solely on its "own profit-making incentives." *Id.* South Carolina wholly misapprehends the relevant statutory and regulatory regime and the obligations it imposes on Duke. Federal law imposes specific public-interest obligations on Duke as a FERC

licensee, including obligations that pertain directly and substantially to Duke's management of the flow of the Catawba.

Under § 4(e) of the FPA, FERC is authorized and empowered to issue licenses, including licenses for dams, reservoirs, and other projects for the development of power from streams and other bodies of water. In doing so, the Commission, "in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife . . . , the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. § 797(e). See also §§ 803(a)(1); 808(a); *Udall* v. *FPC*, 387 U.S. 428, 450 (1967) (FERC must determine whether a hydroelectric project will be in the public interest as a whole).

To implement this statutory mandate, FERC includes within its licenses numerous conditions and requirements that the licensee serve the public interest as defined by FERC. The FERC licensee, in turn, is bound by the FPA and by the terms of its FERC license. See *Alabama Power Co.* v. *FPC*, 128 F.2d 280, 293 (D.C. Cir. 1942) ("the grant of [the license] may be made subject to conditions appropriate to safeguard the interest of the public. Having received its license subject to such conditions, . . . the Company cannot shuck off its obligations as a licensee . . . .") (footnote omitted). See also 16 U.S.C. § 799 ("[e]ach such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter . . . which said terms and conditions and the acceptance thereof shall be expressed in said license").

As § 10 of the FPA mandates:

> All licenses issued under this subchapter shall be on the following conditions:
>
> . . . That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title . . . . [16 U.S.C. § 803(a)(1) (emphasis supplied).]

See also 18 C.F.R. § 4.34 (FERC licenses issue upon the conditions of 16 U.S.C. § 803 and other conditions deemed to be in the public interest).

The FPA's re-licensing requirements underline the fundamental nature of the licensee's public interest obligations. FERC is specifically instructed to consider "the actions taken by the existing licensee related to the project which affect the public" in deciding whether to issue a new license. 16 U.S.C. § 808(a)(3)(B). See also 18 C.F.R. § 16.8 (applicants for a new license must consult with numerous state and federal agencies); *id.* § 16.13(a) (indicating that FERC must determine whether a new license proposal is "best adapted to serve the public interest"); *id.* § 5.29(h) (restating that a license will issue on terms that promote the public interest).

Finally, as a further manifestation of a FERC licensee's duty and right to act in the public interest, the FPA authorizes FERC licensees to exercise the power of eminent domain over privately owned land necessary for the operation or construction of a FERC-licensed project. See 16 U.S.C. § 814. Clearly, an express statutory authorization to exercise the power of eminent domain to serve federal public interest purposes is not possessed by any other, let alone every other, entity with an interest in the Catawba River.

This regulatory scheme is a complete answer to South Carolina's assertion that Duke operates solely as a profit-maximizing entity. There are numerous terms in Duke's current license and in the CRA that mandate that Duke take actions that serve the public interest, rather than maximize profit. See, *e.g.*, *Duke Power Co.*, 20 F.P.C. 360, 361 (1958) (Duke's current license) ("[t]he Secretary of the Interior . . . recommended for inclusion in any license issued certain conditions in the interests of fish and wildlife resources and public enjoyment of such resources, and for archeological salvage in the area to be inundated by the proposed . . . development, all as hereinafter substantially provided").[2] See also, *e.g.*, CRA § 6 (establishing Duke's obligations during drought or low flow, known as the "Low Inflow

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[2] *See also Duke Power*, 20 F.P.C. at 361 (stating that several North Carolina agencies had recommended provisions and negotiated with Duke agreements "with respect to minimum water releases and establishing public recreation areas as hereinafter provided"); *id.* (stating that the South Carolina Board of Health had "recommended for inclusion in any license issued a condition respecting minimum daily flow releases as hereinafter provided"); *id.* at 371, Art. 30 (mandating provision of free recreational areas and minimal water releases to serve "beneficial public uses").

Protocol"); *id.* §§ 9.2.2, 9.2.3, 9.2.5 (Duke's responsibility for monitoring, protecting and promoting culturally and historically relevant artifacts, flora and other properties); *id.* § 10 (Duke's obligations to make flow releases to allow and protect recreational uses, to construct additional recreational facilities); *id.* § 14.5 (Duke's obligation to provide North and South Carolina agencies with more than $9 million to support land purchases for conservation and public recreation upon issuance of a new license).

In light of this federal scheme and the particular licensing obligations imposed on Duke that directly affect the Catawba flow, South Carolina is simply wrong to contend that Duke is no different from other users of the Catawba. And, Duke's argument is not that it represents the federal government, see Opp. 5; nor is Duke required to meet this standard in order to intervene. Duke's point is that federal law imposes on it rights and obligations to act in the public interest, and therefore that its rights and obligations with respect to the Catawba are both compelling and unique.

South Carolina claims that Duke's preferred equitable apportionment will be based solely on its profit-maximizing interests, Opp. 5, and that this "may not serve the varied needs of both States' citizens well in the long run," *id.*

As South Carolina well knows, this statement is utterly inconsistent with the 70-party negotiation (including numerous governmental entities in North and South Carolina) that recently resulted in the CRA – the terms of which all parties agreed represented a fair accommodation of all relevant public and private interests in the Catawba. It is this consensus determination about the Catawba that Duke seeks to defend and represent, rather than the

interest of either State in maximizing its own apportionment. Indeed, Duke's position serves and furthers the strong FERC policy favoring the settlement of issues related to the licensing of FPA projects. See *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 71 Fed. Reg. 56,520, 56,521 (Sept. 27, 2006) (policy statement) ("Commission looks with great favor on settlements in licensing cases").[3]

In any event, the Court will benefit from the involvement of Duke in order to fully air the federal issues at stake in the litigation. This is particularly so in light of the fact that the possibility of apportionment exists almost entirely because of Duke's federally-licensed project on the Catawba. During times of drought, were it not for the waters impounded by Duke in North Carolina, there would be *very little water available* for flow into South Carolina. In a very real sense, it is only Duke and its federal license that make both the existence of this case and any remedy possible.

As an impounder of water, Duke has concrete interests in that water – interests of ownership and management – that are determined and regulated by federal and state law. In addition, as a public utility Duke is obligated by state law to serve the public interest. See, *e.g.*, N.C. Gen. Stat. § 62-2(a); S.C. Code Ann. §§ 58-4-10; 58-1-65(A)(2). Any equitable apportionment of the Catawba will necessarily consider, address and affect Duke's many interests in

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[3] *See also Erie Boulevard Hydropower, L.P.*, 120 FERC ¶ 61,267, at 62,187 (2007) ("policy of encouraging settlement agreements in hydroelectric licensing proceedings"); *Alcoa Power Generating, Inc.*, 110 FERC ¶ 61,056, at 61,271 (2005) (same).

the River, as the federal common law applied by this Court sorts through the relevant interests, current uses and applicable laws. See *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945); *Connecticut* v. *Massachusetts*, 282 U.S. 660, 670-71 (1931) (equitable apportionment turns on "consideration of the pertinent laws of the contending States and all other relevant facts").[4]

Only Duke among the parties will be concerned with the relationship between the FPA and its regulations and the federal common law governing equitable apportionment. Only Duke has a compelling set of rights and interests to protect arising from its status as a federal licensee and public utility in both States.

2. Duke's Interests Are Not Represented By Either Or Both States.

South Carolina also claims that North Carolina already represents the federal interests that Duke seeks to intervene to protect. Opp. 6. For this, South Carolina first cites Duke's request to intervene as a defendant. This indicates only that Duke opposes any equitable apportionment that does not take into account its interests as a FERC licensee, license applicant, and impounder of water. It does not

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[4] South Carolina completely misunderstands the import of Duke's citation of the North Carolina law giving impounders of water interests in the impounded water. Opp. 9. That property interest alone does not create a right that supports intervention; nor did Duke suggest that it "trump[s] the federal common law of equitable apportionment." *Id.* But, the state law is clearly relevant to the equitable apportionment analysis; in combination with Duke's other interests and obligations as a FERC licensee, Duke is uniquely suited to assist the Court and to protect the public interest obligations it must assume as a matter of federal and state law.

indicate, as Duke's prayer for relief in its Answer makes clear, that Duke seeks to maximize North Carolina's portion of the Catawba's waters or that Duke opposes any particular equitable apportionment (other than those inconsistent with the terms of the CRA).

South Carolina makes much of North Carolina's citations of the CRA. But North Carolina cited those provisions, and their proposed protection of certain minimum flows into South Carolina, as a reason for this Court to deny the motion for leave to file a bill of complaint (because the CRA would provide South Carolina with adequate flow). North Carolina certainly did not characterize the CRA as the correct resolution of any equitable apportionment case. North Carolina may seek to maximize its portion, as South Carolina surely will.

This, in turn, may endanger the negotiated solution embodied in the CRA. Duke's interests cannot be represented by either State seeking to maximize its own portion at the other's expense. Duke has reservoirs, public and private interests, customers and regulators in both States. Duke's position is that whatever equitable apportionment is ordered, the terms of the CRA – the product of a three-year process in which participants moved away from seeking simply to maximize their own positions and toward an acceptable compromise – should be protected so that Duke can continue to operate in the public interest in the Catawba basin. Neither State represents this amalgam of interests.[5]

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[5] Duke is unsure of the significance of South Carolina's assertion that there is no current dispute over the meaning of the CRA. Opp. 7. Duke agrees. The point is that neither State will necessarily protect or even have regard for Duke's interest

South Carolina next contends that the fact that Duke has reservoirs in both States is irrelevant – *i.e.*, that Duke's interests can nonetheless be protected by those States. Opp. 7. But this contention ignores the undisputed facts. Duke is not interested in maximizing the respective portions of either its North Carolina reservoirs or its South Carolina reservoirs as the States are. Instead, Duke is concerned with the overall system, its efficiency and service of the public interest on the terms provided in Duke's current and future federal licenses. It does not serve Duke's interests if its North Carolina reservoirs are full and its South Carolina customers suffer. In fact, the CRA represents the negotiated compromise of diverse interests that seeks to balance the needs of those in both States. And, as noted above, Duke has deep connections and interests in both States that must be reconciled and that are – in light of their interstate nature and the governing federal statute and regulation – considered federal.

That is why South Carolina's citation of *Kentucky* v. *Indiana*, 281 U.S. 163 (1930), see Opp. 8-9, is wholly inapt. Indiana was deemed to represent the interests of all its citizens in the building of a bridge to Indiana, and thus its position that the bridge should

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in defending the CRA, now that this Court is addressing equitable apportionment.

Similarly, Duke agrees that the CRA does not resolve the water rights dispute between North and South Carolina. Opp. 6. Duke seeks, however, to ensure that the federal interests reflected in its current license and, potentially, in the CRA are recognized and protected in any equitable apportionment. It is for this Court to determine the relationship between the FPA and its regulations and the federal common law of equitable apportionment. Unlike either State, Duke has a strong interest in ensuring that FPA-related interests are incorporated and protected in any equitable apportionment analysis.

be built was dispositive and binding on its citizens. For purposes of this analogy, Duke is akin to a person who is a citizen of both Kentucky and Indiana and who has a federal contract requiring him to build the bridge. Duke's interests differ from those of other water users not simply "as a matter of scale," Opp. 10 (though the scale of Duke's interests is unmatched by any other user and gives rise to the ability to apportion water that is at stake in this litigation). Both the nature and federal source of its interests set Duke apart.

As the foregoing makes clear, Duke's peculiar interests, if recognized by this Court, could not conceivably open this case to intervention by significant numbers or, indeed, any other private parties. No one is similarly situated or possesses analogous interests. South Carolina's argument that the motion to intervene by the Catawba River Water Supply Project demonstrates that the floodgates are open, see Opp. 10, is entirely unpersuasive. The filing of a motion does not demonstrate its merit – and the filing of a single motion is not even a trickle, much less a flood.

In sum, Duke's interests, arising from its status as a FERC licensee and a current applicant for a new FERC license and its massive impoundments of water, are compelling and unique. Those interests are not represented by either party State.

B. South Carolina's Attempt To Distinguish Applicable Precedent Is Unavailing.

South Carolina's attempts to distinguish this Court's principal authorities concerning intervention in original actions serve only to highlight the strong case for intervention here.

In *Arizona* v. *California*, this Court authorized tribes with affected property interests to intervene in an equitable apportionment action. See 460 U.S. at 615. South Carolina says that the intervention was allowed "only because the Tribes are afforded special protections under federal law." Opp. 11. This is not the only reason that intervention was permitted. See 460 U.S. at 614-15 ("[t]he Tribes' interests in the waters of the Colorado basin have been and will continue to be determined in this litigation"). More importantly, Duke is in a position directly analogous to that of the Tribes – it has special rights and obligations under federal law. See *supra* at 4-9. And, unlike the Tribes, which were already represented by the United States at the time they intervened, see 460 U.S. at 615, no party represents Duke's interests.

In *Maryland* v. *Louisiana*, this Court authorized intervention by 17 pipeline companies in original litigation concerning the constitutionality of Louisiana's "first use" tax on out-of-state exporters of natural gas brought into Louisiana. See 451 U.S. at 745 n.21. South Carolina first claims that this case is not on point "[b]ecause the tax was imposed directly on the pipelines," and thus "the pipelines had an interest in invalidating the tax that was independent of the interest and authority of the plaintiff States." Opp. 12. But Duke is in precisely the same situation as the taxed pipelines. Just as the tax at issue was imposed directly on the pipelines, heightening their interest and warranting intervention, any equitable apportionment in this case will require Duke's implementation and will affect Duke's management of the waters it impounds pursuant to state law and its FERC license. The effect is even more direct and pronounced than the effect of the tax on the pipelines; indeed, Duke may be directly implementing whatever

equitable apportionment is ultimately ordered. In those circumstances, it surely should be permitted to participate as a party in the proceedings leading to such an order.

South Carolina also argues that *Maryland* v. *Louisiana* is distinguishable because it did not involve equitable apportionment. Opp. 12. The assertion appears to be that unconstitutional taxation is a lesser infringement on sovereignty than equitable apportionment, and therefore that intervention should be more easily allowed. South Carolina not surprisingly cites no case for this proposition, because it has no basis in this Court's analysis of intervention generally.[6]

In a related argument South Carolina asserts repeatedly that this Court has never allowed intervention of a private party in an equitable apportionment case (treating the Tribes in *Arizona* v. *California* as more analogous to a governmental entity than to a private party). Again, South Carolina suggests no basis for treating the joinder of parties differently in equitable apportionment cases than in other inter-state disputes involving questions of sovereign authority. In any event, this Court has allowed non-States, including private parties, to participate in equitable apportionment actions, albeit with joinder achieved by means other than intervention.

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[6] South Carolina also argues that intervention was permitted in *Maryland* v. *Louisiana* in part because only 17 pipelines were involved, while Duke's intervention would open the floodgates. Opp. 12. We showed *supra* that this is wrong. Moreover, any motion to intervene filed now could be rejected as untimely given the motions that already have been filed.

Colorado v. *Kansas*, 320 U.S. 383 (1943), was filed roughly two decades after Kansas unsuccessfully sued Colorado over the equitable apportionment of the Arkansas River. *Id.* at 384-88. Colorado sued Kansas and joined a Kansas water users' association, seeking to enjoin that association from prosecuting water adjudication suits in Colorado against private parties appropriating water in that State. *Id.* Likewise, in *Arizona* v. *California*, 373 U.S. 546 (1963), Arizona filed suit to determine the respective States' shares of Lower Colorado River Basin water under the Boulder Canyon Project Act, and joined as defendants a number of public agencies which had water delivery contracts with the Secretary of the Interior. *Id.* at 551-52 & n.2, 561-62. In both cases, the plaintiff State named defendants in addition to the opposing state. There is no special or heightened bar for party status generally and intervention specifically in equitable apportionment cases.

Finally, South Carolina claims that cases like *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), allowing the intervention of affected property rights holders in boundary disputes between states, can be explained by the fact that, absent joinder, it was unclear whether private parties were bound by the outcome of original actions. Opp. 13. There is no hint of this rationale in the Court's subsequent intervention decisions in *Maryland* v. *Louisiana* and *Arizona* v. *California*. Instead, the requirement is that the putative intervenor demonstrate a compelling interest not adequately represented by a party state – a test Duke has fully satisfied.[7]

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[7] The water rights treatise that South Carolina cites for this reading of *Oklahoma* v. *Texas*, *see* Robert E. Beck et al., *Water and Water Rights* (1991 ed., 2004 replacement vol.) explains that "individual water claimants" generally are not joined in

C. Duke's Interests Warrant Party, Not *Amicus*, Status.

South Carolina last makes the straw man argument that Duke's relevant knowledge and expertise – here undisputed – are not sufficient to confer intervenor status. Opp. 13. As South Carolina is fully aware, Duke pressed no such contention. Duke rests on the full set of interests articulated in its motion and above, adding that its party (as opposed to third-party) status will facilitate its production of relevant expertise and knowledge.[8] Far from complicating or protracting the discovery process and factual development, Duke's presence – without the need for third-party subpoena and scheduling – will expedite and streamline this litigation.

In addition, Duke's party status is essential to the formulation of any remedy in this action. Duke manages the impounded water that will allow apportionment. And, with respect to any remedy, Duke is bound by its federal license and the interests it is obligated to serve.

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equitable apportionment actions. *See* Opp. 13 n.3. This is neither Duke's argument, nor an accurate characterization of Duke's status.

[8] Notably, although Duke's application for a new license is pending, certain portions of the CRA, which is also a contract among the signatory parties, have already become effective and impose obligations on the parties. *See, e.g.*, CRA §§ 5.8.2 (cumulative water use), 5.10.1 (formation of Water Management Group), 6.6 (Drought Response Plan Updates), 14.5.3.3 (financing of state agencies for land acquisition), 15.6.1 (development of groundwater monitoring plan by 12/31/07 for inclusion in LIP). In addition, the current License will be renewed annually until a new license issues.

To appear reasonable, South Carolina points out that Duke could appear as an *amicus*; but given the intimate role that Duke should play in any final determination of this litigation, *amicus* status is inadequate. The ability to file briefs on the basis of a record that Duke has no ability to shape simply risks ignoring Duke's interests and impairing both the litigation of the merits and the proper remedy of the claim at issue.

CONCLUSION

Duke's motion for leave to intervene and file an answer should be granted.

Respectfully submitted,

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December 19, 2007

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No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Bill of Complaint

MOTION FOR LEAVE TO INTERVENE OF THE CITY OF CHARLOTTE, NORTH CAROLINA, AND BRIEF IN SUPPORT OF MOTION

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IN THE

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No. 138. Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Bill of Complaint

MOTION FOR LEAVE TO INTERVENE OF THE CITY OF CHARLOTTE, NORTH CAROLINA, AND BRIEF IN SUPPORT OF MOTION

Pursuant to this Court's Rule 17, the City of Charlotte, North Carolina, through its City Attorney, DeWitt F. McCarley, hereby moves for leave to intervene as a party defendant in this action.

INTRODUCTION

The City of Charlotte respectfully requests that it be granted leave to intervene as it has a substantial interest in this water rights dispute. Charlotte, which sits on the border between the Carolinas, is by far the largest municipality on the Catawba River and the largest provider of water supply and wastewater treatment services in the Catawba River

Basin. Therefore, and not surprisingly, Charlotte is one of the principal stakeholders in the negotiated Comprehensive Relicensing Agreement relating to Duke Energy's hydroelectric power facilities on the Catawba River.

Much of South Carolina's complaint is aimed at the North Carolina inter-basin transfer (IBT) statute and the IBTs from the Catawba River authorized under that statute, and this puts Charlotte squarely in South Carolina's crosshairs. Charlotte is the government entity in North Carolina vested with the legal authority to carry out the large majority of the IBTs to which South Carolina objects. Charlotte possesses a Certificate issued by the North Carolina Environmental Management Commission authorizing the City to execute IBTs of up to 33 million gallons per day (MGD) from the Catawba River. And Charlotte may soon be responsible for another 10 MGD of such IBTs. Given its important interests and its IBT authority, Charlotte should be allowed to take its place as a party defendant in this case.

STATEMENT

I. CHARLOTTE'S INTER-BASIN TRANSFERS AND WATER SUPPLY SERVICES ARE THE PRIMARY TARGETS OF SOUTH CAROLINA'S COMPLAINT.

A. Charlotte Is the Largest Municipality and Largest Provider of Water Supply and Wastewater Treatment Services in the Catawba River Basin.

Charlotte is the largest of 18 Metropolitan Statistical Areas in the two Carolinas, and is by far the largest provider of water supply and wastewater treatment services in the Catawba River Basin. Since 1911, when Charlotte first tapped the Catawba

River for water, the breadth of Charlotte's services has grown steadily until, in 2006, Charlotte served a population of more than 800,000 in six counties and nine towns in both North Carolina and South Carolina. Charlotte also has service connections with the City of Concord in Cabarrus County, and with Union County, enabling Charlotte to serve these areas on an emergency basis when needed. A cost-effective response to the water supply and sewage treatment services requirements of the metropolitan area's rapid expansion is likely to depend on Charlotte's system.

Charlotte's water supply service accounts for approximately 53 percent of all municipal usage of the water resources of the Catawba River Basin. Among North Carolina users, Charlotte withdraws 64 percent of the water taken from the River for municipal water supplies.

Charlotte's population, as well as its institutional, industrial, and commercial customer base, are growing rapidly. From 1987 through 2006, the population in Charlotte's service area grew from about 480,000 to more than 800,000, and the demand for treated water supplies grew from 57 MGD to 110 MGD. Recent studies project that these demands will continue to increase at an annual rate of 1.5 percent, resulting in water supply needs of 215 MGD and wastewater treatment needs of 159 MGD by 2050.

B. Charlotte Accounts for the Large Majority of the Inter-Basin Transfers About Which South Carolina Complains.

Charlotte accounts for the lion's share of the inter-basin transfers of water from the Catawba River Basin in North Carolina—the very IBTs that prompted South Carolina to bring this action. Fur-

thermore, Charlotte may in the future account for nearly all of such IBTs.

Charlotte is responsible for public water supplies to all of Mecklenburg County, which lies in the rolling terrain of the Appalachian foothills spanning the Rocky/Yadkin/Pee Dee (RYPD) and Catawba River Basins. The Catawba River forms the County's western boundary. A north-south ridgeline transects the County, leaving approximately the eastern one-third portion of the County in the RYPD Basin, which offers far less plentiful and less dependable water supplies. *See* Exhibit 1 (map of Catawba River Basin). For this reason, Charlotte relies on its Catawba River intakes and well-established system of water treatment facilities to service customers in both basins. After use, treated wastewater in the RYPD Basin is discharged to local streams and rivers rather than being piped back to the Catawba Basin for discharge. This efficient process for serving all residents of the County results in IBTs.

Since 1990, Charlotte has experienced considerable population growth in the northern and eastern portions of its service area within Mecklenburg County. Much of the increased water demand resulting from population growth in these areas arises just east of the ridgeline within the RYPD Basin. *See* Exhibit 1 (map). Especially in the northern portion of the service area, these expanding communities are located only a few miles from Charlotte's high-capacity water intake at Lake Norman on the Catawba River just west of the ridgeline. These customers cannot rely on the meager headwaters of the nearby Rocky River, and are located some 20 miles from the modest water flows of the upper reaches of the Yadkin River to the east.

In its complaint, South Carolina focuses its claims primarily on the two permits granted by North Carolina for IBTs from the Catawba River Basin to the RYPD River Basin. *See* Complaint ¶¶ 3, 20. Charlotte holds the larger (33 MGD) of these two permits. The Cities of Concord and Kannapalis hold the smaller (10 MGD) permit but, as discussed below, Charlotte may well be called upon to implement this IBT as well.

On March 14, 2002, the North Carolina Environmental Management Commission (EMC) approved Charlotte's request for an increase in its IBT authority from 16.1 MGD to 33 MGD in order to meet water supply needs in eastern Mecklenburg County through the year 2030. *See* Exhibit 2 (Environmental Management Commission, Certificate Authorizing the Charlotte-Mecklenburg Utilities to Increase Their Transfer of Water from the Catawba River basin to the Rocky River basin under the Provisions of G.S. 143-215.22I (Mar. 14, 2002)) (Charlotte IBT Certificate). The EMC found:

> [T]he transfer is necessary to supply water to the growing communities of this area. Water from the source basin is readily available and within a short distance from the service area. Therefore the transfer is a reasonable allocation to these communities. The transfer will greatly benefit these communities by providing raw water of high quality for residential and industrial purposes.

Id. at 4e. The EMC also analyzed the effect of Charlotte's 33 MGD IBT on the entire Catawba Basin, including water flows and utilization in South Carolina, and specifically found that, even with the resulting reductions in flows from Lake Wylie into South Carolina, detrimental effects on the Catawba

Basin, would be "insignificant." *Id.* at 5e. Next, the EMC considered whether communities in eastern Mecklenburg County could obtain their water from the Rocky River, and found that this option would be less feasible than Charlotte's requested IBT because it would entail the difficult task of constructing new reservoirs in a rapidly developing urban area. *Id.* at 7e. Finally, the EMC rejected the option of returning wastewater to Charlotte's McAlpine wastewater treatment plant for discharge into the Catawba Basin because the South Carolina Department of Health and Environmental Control would likely object to the increased discharges from that plant. *Id.* In the final analysis, the EMC concluded that "(1) the benefits of the proposed transfer outweigh the detriments of the proposed transfer, and (2) the detriments of the proposed transfer will be mitigated to a reasonable degree." *Id.* at 9e.

On January 10, 2007, the EMC granted a request from the Cities of Concord and Kannapolis for an IBT of 10 MGD from the Catawba Basin to the RYPD Basin to meet anticipated water needs through the year 2035. *See* Environmental Management Commission, Certificate Authorizing the Cities of Concord and Kannapolis to Transfer Water from the Catawba River and Yadkin River Basins to the Rocky River basin under the Provisions of G.S. 143-215.22I (Jan. 10, 2007). This IBT would provide approximately 15 percent of the necessary maximum daily demand expected for a population of over 400,000 in 2035. *See id.* at 2. The EMC found:

> Based on the record, the Commission finds that current water supplies are insufficient to supply the Cities of Concord and Kannapolis and their related service areas on the reasonable planning

> horizon of the year 2035. Providing water for the anticipated growth of these communities will have a major beneficial effect. The Commission projects that the water supply deficit for these areas will be about 18.32 MGD on a maximum calendar day basis in 2035. [*Id.* at 5.]

As it had for the Charlotte IBT request, the EMC analyzed the impacts of the Concord/Kannapolis request on the entire Catawba River Basin and found that detrimental effects would be "insignificant." *Id.* at 21. The EMC also examined several non-IBT alternatives and found them not to be feasible. *Id.* at 24.

While the actual method for transferring 10 MGD from Lake Norman to Concord/Kannapolis has not been selected, these Cities contemplate that purchasing treated water from Charlotte will be among the preferred options for some or all of this IBT. *Id.* at 1. Concord's corporate limits and water service area are contiguous with Charlotte's service area. *See* Exhibit 1 (map). Charlotte already has the required intake capacity at Lake Norman, and the water treatment capacity necessary to meet those Cities' needs can be added efficiently at Charlotte's Lee S. Dukes, Jr. water treatment plant. Thus, if Concord/Kannapolis select this option, Charlotte will be responsible for implementation of all of the 43 MGD of IBTs to which South Carolina objects in its complaint.

In addition, by seeking an equitable apportionment of the Catawba River and alleging that existing IBTs already exceed North Carolina's equitable share of the River's flows, *see* S.C. App. for Prelim. Inj. at 2, 5-6, South Carolina necessarily claims that existing and planned consumptive uses *within the Catawba River Basin* in North Carolina must be curtailed and

even reduced. Again, Charlotte is the principal target of South Carolina's complaint.

Municipal consumptive uses of water occur due to activities such as lawn watering, use of septic systems, evaporative cooling and product manufacturing. In 2007, Charlotte withdrew an average of 104 MGD from the Catawba River for uses *within* the Basin, and it returned an average of 69 MGD through discharges of treated wastewater to the Catawba River or its tributaries. The difference—approximately 35 MGD—represents average consumptive uses within the Catawba Basin. By 2030, it is estimated that Charlotte's maximum intra-Basin consumptive uses will be 42.2 MGD, or approximately the same amount as the combined IBTs discussed above. *See* Environmental Assessment for Charlotte-Mecklenburg Utitilies for Increase in Inter-Basin Transfer from the Catawba River Subbasin to the Rocky River Subbasin at Table 7 (prepared for the EMC by CH2M HILL, Apr. 2001).

II. CHARLOTTE HAS A SIGNIFICANT INTEREST IN THE NEGOTIATED COMPREHENSIVE RELICENSING AGREEMENT.

As part of its effort to secure a new license from the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act (FPA), *see* 16 U.S.C. § 797(e), for its 11 hydroelectric power facilities on the Catawba River, Duke Energy Carolinas carried out a multi-year negotiation process involving 80 stakeholders in both States to develop a Comprehensive Relicensing Agreement. *See* Comprehensive Relicensing Agreement for the Catawba-Wateree Hydro Project, FERC Project No. 2232 (Dec. 22, 2006) (CRA) (http://www.duke-energy.com/catawba-wateree-relicensing.asp). Charlotte partici-

pated throughout the process, executed the CRA along with 68 other parties, and holds one of 12 seats on the Final Agreement Committee established by the signatories. *See id.* § 26. Among the CRA's signatories are some 28 South Carolina cities, organizations, counties, water and sewer districts, businesses, commissions, residents and departments of the State of South Carolina. *See id.*, App. B (Updated Nov. 2007).

The CRA is a binding contract among the parties to it. *See id.*, Recitals, at 4-5. In their contract, the parties stated that "they are in agreement with the entirety of this Agreement." *Id.* § 1.1. The parties then set forth in great detail all of the river flows, water uses, reservoir levels and other parameters that should govern Duke's operation of its 11 projects. *See id.* §§ 2-15. With respect to water uses, the parties agreed that, based upon their modeling, the amounts of withdrawals and returns set forth in Appendix H would be accommodated if Duke released the specific flow amounts and maintained the specific reservoir levels for each project, as set forth in the Agreement. *See id.* § 5.3. Appendix H, in turn, reflects the withdrawals, consumptive uses and IBTs for which Charlotte has authority, as discussed above. *See id.*, App. H.

The CRA parties expressly set forth their "desire and expectation that the FERC will approve the Agreement * * * and issue a New License for the Project that incorporates, without material modification, the proposed License Articles in Appendix A," which reflect the substance of the CRA. *Id.* § 18.1. Giving concrete effect to this intent, the parties agreed that, with certain limited exceptions:

> [N]o Party may request or advocate, during the period of this relicensing prior to the FERC's issuance of the New License and the closure of all rehearing and administrative challenge periods, by any activity * * * any New License requirements that would, if adopted by the FERC, be an Inconsistent Act. [*Id.* § 20.1.2.]

An Inconsistent Act is defined as "any action by a Jurisdictional Body that increases the burden upon or cost or risk to a Party substantially beyond the burden, cost, or risk assumed by the Party in this Agreement, or deprives a Party of a substantial benefit promised by another Party in this Agreement * * * ." *Id.*, App. E., Definition 23. A Jurisdictional Body is defined as "any governmental body which has the authority to prevent implementation of, or to require that specific steps be followed prior to implementing any part of this Agreement or to require activities that result in an Inconsistent Act." *Id.*, App. E, Definition 24.

South Carolina has brought this action in *parens patriae*, and therefore represents all of the 28 South Carolina parties to the CRA. In its complaint, South Carolina and those parties seek an order that would reduce the amounts of consumptive uses and IBTs reflected in the CRA, and thereby increase Charlotte's burden and cost, and deprive Charlotte of substantial benefits promised by those parties.

ARGUMENT

I. CITIES MAY BE AND HAVE BEEN PARTIES AND INTERVENORS IN ORIGINAL ACTIONS.

The City of Charlotte may properly be made a party in this case. As this Court's cases reflect, cities may be and have been parties in original actions

commenced by States. *See, e.g., New Jersey* v. *City of New York*, 290 U.S. 237 (1933) (enjoining New York City from polluting the waters off the coast of New Jersey); *Georgia* v. *City of Chattanooga*, 264 U.S. 472 (1924) (granting leave to file bill of complaint seeking to enjoin Chattanooga from appropriating land owned by Georgia); *Wisconsin* v. *City of Duluth*, 96 U.S. 379 (1877) (rejecting on the merits Wisconsin's bill in chancery seeking to enjoin Duluth's diversion of the St. Louis River through a federally-funded canal); *see also Illinois* v. *City of Milwaukee*, 406 U.S. 91, 97 (1972) (concluding, in action brought by Illinois against four Wisconsin cities, that "while, under appropriate pleadings, Wisconsin could be joined as a defendant in the present controversy, it is not mandatory that it be made one"). [1]

Furthermore, in a prior original action brought by one State against another State, this Court granted a city's motion to intervene. *See Texas* v. *Louisiana*, 426 U.S. 465, 466 (1976) (noting that the City of "Port Arthur, Tex., was permitted to intervene for purposes of protecting its interests in the island claims of the United States"); *see also Texas* v. *Louisiana*, 416 U.S. 965 (1974) (order granting Port Arthur's motion). For the reasons that follow, this Court should grant the City of Charlotte leave to intervene as a party defendant in this action.

---

[1] The Court in *Illinois* v. *City of Milwaukee* observed that non-exclusive original jurisdiction under 28 U.S.C. § 1251(b)(3) extends to a suit by a State against the "political subdivisions of a State." 406 U.S. at 98.

II. CHARLOTTE POSSESSES THE AUTHORITY TO CARRY OUT THE LARGEST AND MOST SIGNIFICANT INTER-BASIN TRANSFERS OF CATAWBA RIVER WATER.

1. The City of Charlotte should be a party to this original action, first and foremost, because it is the entity vested with the legal authority to carry out the largest and most significant IBTs from the Catawba River that are the focus of South Carolina's complaint. Thus, Charlotte has a major interest in defending the current IBT regime.

Charlotte possesses a Certificate, issued in 2002 by the North Carolina Environmental Management Commission, authorizing the City to execute IBTs from the Catawba River of 33 million gallons per day (MGD) on a maximum day basis. *See* Exhibit 2 (Charlotte IBT Certificate). The IBT Certificate was issued under the authority of North Carolina's former IBT statute. *See* N.C. Gen. Stat. § 143-215.22I (1993) (repealed effective Aug. 31, 2007).

South Carolina's Complaint focuses upon the 48 MGD of water authorized by North Carolina law and the EMC to be transferred from the Catawba River Basin. *See* Complaint ¶¶ 3, 20. Charlotte is authorized to carry out 33 MGD of the 48 MGD at issue and soon may be responsible for an additional 10 MGD authorization. Indeed, South Carolina specifically complains about Charlotte's IBT Certificate authorizing "the Charlotte-Mecklenburg Utilities to transfer up to 33 million gallons per day from the Catawba River Basin to Rocky River Basin, more than double the 16 million gallons per day limit that had previously applied." *Id.* ¶ 20(a). *See also* S.C. Br. in Supp. of Mot. for Leave to File Compl. at 7.

Accordingly, Charlotte has a direct and significant stake in the present controversy. As the public water supplier providing over half of the municipal water supply withdrawn from the Catawba River, Charlotte has an enormous responsibility to provide safe and adequate service, and a critical interest in defending its authority under its IBT Certificate. Charlotte's public responsibilities would be jeopardized if South Carolina's claim for equitable apportionment resulted in an injunction that would prevent Charlotte from carrying out the IBTs that its Certificate authorizes. *See* S.C. Complaint, Prayer for Relief, ¶2 (seeking injunctive relief).

That Charlotte should be a party to this action is strongly supported by New York City's party status in *New Jersey* v. *New York*, 283 U.S. 336 (1931) (*New York*). In that original action, New Jersey sued the State and City of New York in 1929 to enjoin a proposed diversion of water from the Delaware River "in order to increase the water supply of the City of New York." *Id.* at 342. [2] New York City was present in the case, this Court explained, "since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey." *New Jersey* v. *New York*, 345 U.S. 369, 375 (1953) (*per curiam*). "New Jersey joined the City of New York as a defendant, because the City, acting under State authority, was planning the actual diversion of the water for its use." *Id.* at 370-371.

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[2] The Commonwealth of Pennsylvania promptly moved for leave to intervene, and this Court granted the motion in January 1930. *See New Jersey* v. *New York*, 280 U.S. 528 (1930) (order).

So too here. Charlotte is the dominant "authorized agent for the execution of the sovereign policy" at issue, *i.e.*, the inter-basin transfers of Catawba River water, and it is Charlotte that, "acting under State authority," is responsible for the largest and most significant "actual diversions of water" (current and planned) that South Carolina claims are injurious.

In *New York*, New Jersey sought to prevent diversions of water from the Delaware River to New York City. It would have made little sense for that action to proceed without New York City as a party defendant. In this action, South Carolina seeks to prevent inter-basin transfers of water from the Catawba River—transfers predominately carried out by the City of Charlotte. It makes little sense for this action to proceed without Charlotte as a party defendant. [3]

To be sure, New York City, unlike Charlotte, "was forcibly joined as a defendant to the original action." *Id.* at 375. But that does not answer the question whether Charlotte should be permitted to join the action as a willing defendant. The instant action is incomplete without Charlotte.

Missouri v. *Illinois*, 180 U.S. 208 (1901), provides further support for affording Charlotte party status. In that original action, Missouri filed a bill of complaint against Illinois and the Sanitary District of the City of Chicago seeking to enjoin those two defendants from discharging sewage into the Mississippi River. Ruling on a demurrer to the bill, this

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[3] The decree entered by the Court in 1931 restrained New York City as well as New York State. *See New Jersey* v. *New York*, 283 U.S. 805 (1931). If any decree entered in this action is to bind the City of Charlotte, as a practical matter the City should be a party to the litigation.

Court deemed both Illinois and the Chicago Sanitary District to be proper party defendants. With respect to the Chicago Sanitary District, this Court commented that it "is an agency of the state to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended." *Id.* at 242. Exactly the same can be said here of the City of Charlotte.

2. It is true that this Court, in 1953, denied the City of Philadelphia's motion to intervene in *New York*. *See id.* at 372-375. [4] But the Court had compelling reasons to deny Philadelphia's motion to intervene that do not apply to Charlotte.

First, Philadelphia, unlike New York City, was not "the authorized agent for the execution of the sovereign policy which threatened injury." *Id.* at 375. Charlotte is. This Court recognized the distinction, and based on it rejected Philadelphia's argument that New York City's presence in the case was a reason to allow Philadelphia to intervene. *See id.* at 374-375. Here, Charlotte's "position in the case," *id.* at 375, is close to the position of New York City, not Philadelphia.

Second, Philadelphia sought to intervene more than twenty years too late. New Jersey filed suit against the New York defendants in 1929, Pennsylvania intervened in 1930, and this Court entered its

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[4] Although the Court denied Philadelphia's motion to intervene, the issue presented by the motion was sufficiently important and close that the Court scheduled oral argument on the motion. *See New Jersey* v. *New York*, 344 U.S. 932 (1953) (order). Two Justices dissented from the Court's decision to deny intervention. *See* 345 U.S. at 375-376 (Jackson, J., dissenting).

original decree in 1931. Philadelphia did not move to intervene until 1952—more than two decades after each of these events. *See id.* at 370-374. [5] Here, this Court granted South Carolina leave to file its bill of complaint on October 1, 2007, and appointed a Special Master on January 15, 2008. Thus, Charlotte's motion to intervene is timely. *See* Part IV, *infra*.

III. CHARLOTTE SHOULD NOT BE DENIED PARTY STATUS SIMPY BECAUSE NORTH CAROLINA IS A DEFENDANT.

In *New York*, this Court stated that "[a]n intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." 345 U.S. at 373. In this case, the City of Charlotte should not be barred from joining this litigation as a party defendant merely because the State of North Carolina is already such a party.

To begin with, the force of the *New York* principle (it cannot be called a rule) is not strong. *New York* itself proves as much. The Court could have required New York City to show cause why it should not be dismissed from the case due to the presence of New York State in the litigation. It did not do so.

Furthermore, the Court has not always applied the *New York* principle or required an intervenor city to

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[5] Philadelphia filed its motion to intervene on December 13, 1952, eight months after New York City, supported by New York State, had moved on April 1, 1952, to modify in certain respects the 1931 decree.

make the showing suggested in *New York*. In *Texas* v. *Louisiana*, *supra*, this Court permitted the City of Port Arthur, Texas, to intervene even though Texas was already a party. *See supra* at 11. Port Arthur did not attempt to make the showing suggested in *New York*, and this Court granted Port Arthur's motion to intervene without asking it to do so.

In any event, Charlotte has "a compelling interest in [her] own right, apart from [her] interest in a class with all other citizens and creatures of the state." *New York*, 345 U.S. at 373. As shown above, Charlotte is not only the largest municipality and provider of water supply services in the Catawba River Basin but holds the IBT certificate authorizing the largest and most significant inter-basin transfers of the Catawba River. As such, Charlotte clearly is not "in a class with all other citizens and creatures of the state." There are other municipalities along the Catawba River, but Charlotte's size and IBT Certificate place her in a class by herself.

Finally, Charlotte's interest is not a carbon copy of North Carolina's. *Cf. New York*, 345 U.S. at 374 (Philadelphia was "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests."). There are two material differences between Charlotte's interest and North Carolina's.

1. North Carolina as *parens patriae* must represent the interests of all water users in the State along the Catawba River, including municipal users upstream of Charlotte whose interests may not be aligned with Charlotte's interests. Charlotte's inter-

est, meanwhile, is exclusively that of a downstream water user.

The Eighth Circuit in *South Dakota* v. *Ubbelhohde*, 330 F.3d 1014 (8th Cir. 2003) (*South Dakota*), *cert. denied*, 541 U.S. 987 (2004), addressed a very similar situation. There, the State of South Dakota sued the U.S. Army Corps of Engineers over the Corps' decisions with respect to the release of water from reservoirs on the Missouri River. The State of Nebraska moved to intervene, but the District Court denied the motion. Relying on the *parens patriae* principle, the District Court ruled that Nebraska's interests were adequately represented by the Corps.

The Eighth Circuit reversed and held that Nebraska was entitled to intervene as a matter of right. Addressing *parens patriae*, the Eighth Circuit observed that "[t]he Corps is charged with managing the Missouri River system as a whole—a charge that requires it to balance the interests of upstream and downstream users. The proposed intervenors, on the other hand, wish to represent exclusively downstream interests." 330 F.3d at 1025. In light of the Corps' charge to represent both upstream and downstream users, the Eighth Circuit reasoned that the *parens patriae* principle was not a bar to Nebraska's intervention. As the Eighth Circuit stated:

> South Dakota asks this Court to hold that the Corps will adequately represent downstream users. We decline to do so. Given that the Corps is asked to balance multiple interests, we conclude that it cannot adequately represent the interests of downstream users in this case. The *parens patriae* presumption, therefore does not present an obstacle to intervention. [*Id.*]

See also Alabama v. *U.S. Army Corps of Eng'rs*, 229 F.R.D. 669, 675 (N.D. Ala. 2005) (*Alabama*) (following *South Dakota* and permitting the City of Montgomery, Alabama, water board to intervene in water rights litigation despite the objection that the State of Alabama stood in a *parens patriae* relationship to the intervenor).

South Dakota and *Alabama* illustrate one clear difference between Charlotte's interest and North Carolina's. Charlotte sits on the border between North Carolina and South Carolina, and the City's service area extends downstream of all other North Carolina users of the Catawba River. North Carolina—like the Corps in *South Dakota*—must "balance [the] multiple interests" of all "upstream and downstream users" of the River in the State whereas Charlotte's interests are "exclusively downstream." *South Dakota*, 330 F.3d at 1025.

2. Charlotte has a strong interest in securing the benefits promised by the 28 South Carolina parties that signed the CRA. So too does the State of North Carolina. Unlike Charlotte, however, North Carolina has duties under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, that kept North Carolina from assenting to the precise magnitude and timing of uses and IBTs delineated in the CRA for the benefit of Charlotte and its water supply customers.

Section 401 requires States to certify that federal licenses for activities resulting in discharges into navigable waters—such as the FPA license for which Duke has applied—"will not violate certain water quality standards, including those set by the State's own laws." *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1846 (2006). In recognition of

North Carolina's Section 401 duties, the CRA provides that nothing in it shall affect or limit North Carolina's authority "pursuant to 33 U.S.C. § 1341, and related state statutes and rules, to issue a water quality certification, or to alter its water quality certification, with whatever conditions the State of North Carolina * * * determine[s] should be included." CRA § 19.3. The CRA also provides that, for purposes of discharging its "rights, duties and responsibilities under 33 U.S.C. § 1341, the State of North Carolina * * * do[es] not assent to any fact, opinion, approach, methodology, and principle, expressly identified or otherwise implied in this Agreement." CRA § 19.3. Charlotte is not constrained in this fashion by the CRA or Section 401. Accordingly, Charlotte's interest in defending and securing the full range of benefits under the CRA is not subject to duties imposed by Section 401.

IV. CHARLOTTE'S MOTION TO INTERVENE IS TIMELY.

Charlotte's motion to intervene is timely because this original action is still at a preliminary stage. On October 1, 2007, the Court granted South Carolina's motion for leave to file a bill of complaint. On November 30, 2007, Duke Energy Carolinas, LLC, and the Catawba River Water Supply Project filed motions to intervene; those motions remain pending. On January 15, 2008, the Court appointed a Special Master and referred to her the pending motions to intervene. Given the limited proceedings that have taken place to this point, Charlotte's motion is timely. *Cf. Alabama*, 229 F.R.D. at 672 (motions to intervene were timely, even though "the case before the court is fifteen years old," because "[t]he court has not yet conducted proceedings on the merits of

the case, and the movants' intervention will not delay the proceedings").

CONCLUSION

For the foregoing reasons, the City of Charlotte's motion for leave to intervene should be referred to the Special Master and should be granted.

Respectfully submitted,

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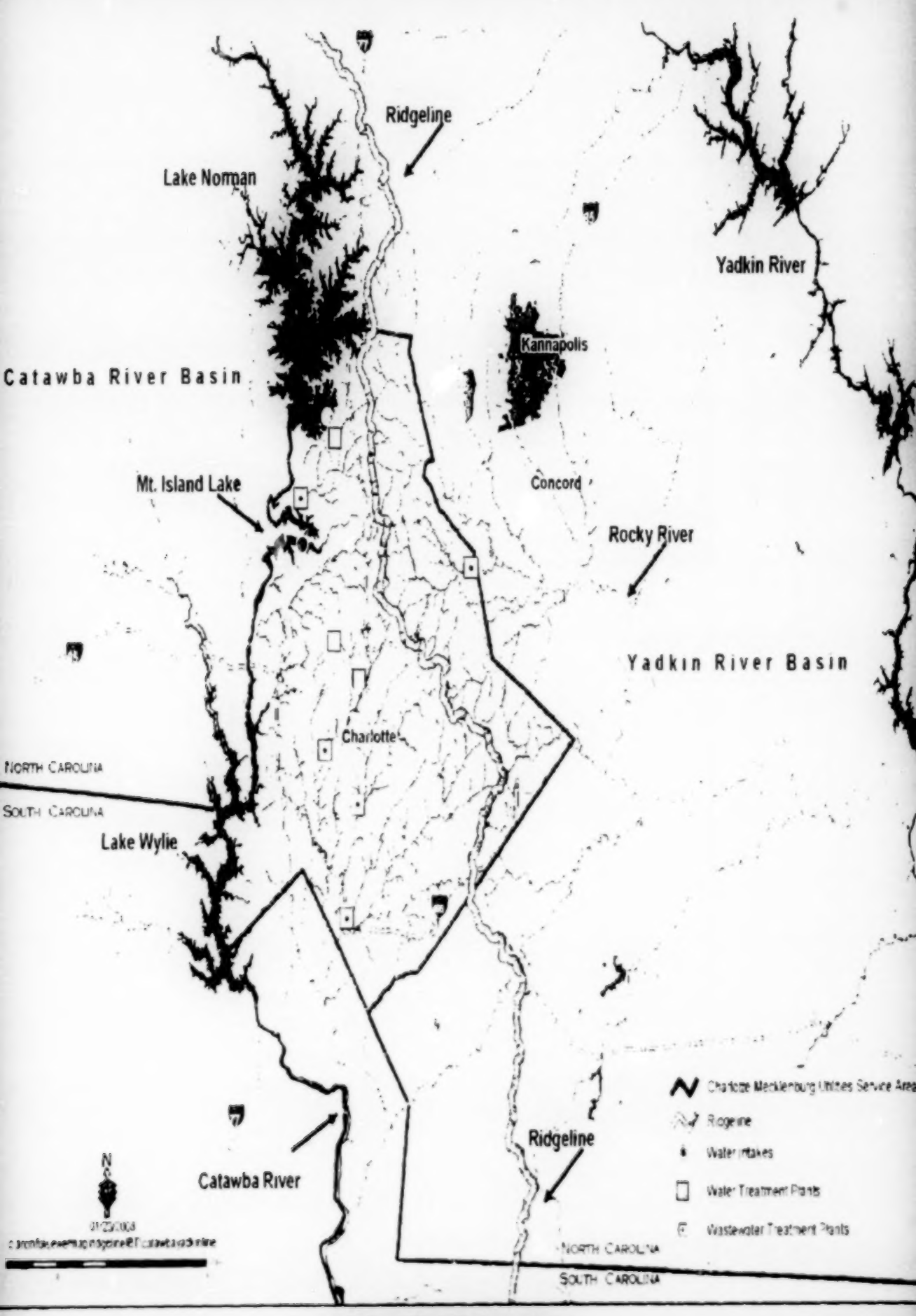
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FEBRUARY 2008

EXHIBITS



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EXHIBIT 2

ENVIRONMENTAL MANAGEMENT COMMISSION

Certificate Authorizing the Charlotte-Mecklenburg Utilities to Increase Their Transfer of Water from the Catawba River basin to the Rocky River basin under the Provisions of G.S. 143-215.22I

In August 2001, the Charlotte-Mecklenburg Utilities (CMU) petitioned the Environmental Management Commission (EMC) for an increase in interbasin transfer (IBT) from the Catawba River Basin to the Rocky River Basin. CMU requested an increase from the grandfathered IBT of 16.1 million gallons per day (mgd) to 33 mgd (maximum day basis). The proposed IBT is based on additional water withdrawals from Lake Norman and Mountain Island Lake in the source basin (Catawba River Basin). The IBT will increase due to transfer of the water to the receiving basin (Rocky River Basin) via consumptive use in eastern Mecklenburg County and existing discharges at Mallard Creek Wastewater Treatment Plant [WWTP] and Water and Sewer Authority of Cabarrus County's [WSACC] Rocky River Regional (RRR) WWTP. CMU requested an increase to 33 mgd, will allow CMUD to meet projected water supply demands through the year 2030 in eastern Mecklenburg County. *This IBT does not include transfers associated with water or wastewater service provided to the Goose Creek watershed in the Town of Mint Hill in Mecklenburg County.* Public hearings on the proposed transfer increase were held in Huntersville on December 11, 2001 pursuant to G.S. 143-215.22I.

The EMC considered the petitioner's request at its regular meeting on March 14, 2002. According to

G.S. 143-215.22I (g), the EMC shall issue a transfer certificate only if the benefits of the proposed transfer outweigh the detriments of the proposed transfer, and the detriments have been or will be mitigated to a reasonable degree.

The EMC may grant the petition in whole or in part, or deny it, and may require mitigation measures to minimize detrimental effects. In making this determination, the EMC shall specifically consider:

1. The necessity, reasonableness, and beneficial effects of the transfer.
2. Detrimental effects on the source river basin.

2a. The cumulative effect on the source major river basin of any water transfer or consumptive water use.

3. Detrimental effects on the receiving basin.
4. Reasonable alternatives to the proposed transfer.
5. Use of impounded storage.
6. Purposes and water storage allocations in a US Army Corps of Engineers multipurpose reservoir.
7. Any other facts or circumstances necessary to carry out the law.

In addition, the certificate may require a drought management plan. The plan will describe the actions a certificate holder will take to protect the source basin during drought conditions.

The members of the EMC reviewed and considered the complete record which included the hearing officer's report, staff recommendations, the applicant's petition, the Final Environmental

Assessment, the public comments relating to the proposed interbasin transfer, and all of the criteria specified above. Based on that record, the Commission makes the following findings of fact.

Finding of Fact

THE COMMISSION FINDS:

(1) **Necessity, Reasonableness, and Benefits of the Transfer**

The proposed transfer will provide water to Mecklenburg County, City of Charlotte, and other communities in the county. The current population served is about 636,000 with a maximum day water use of about 154 million gallons per day (mgd). Projections assume a 2.6 percent annual increase through 2010 decreasing to 1.3 percent by 2030. The projected 2030 serve population is 1,101,000 with a maximum day water use of about 245 mgd.

The western boundary of Mecklenburg county includes Lake Norman and Mountain Island Lake which are CMU's two water sources. CMU's current combined withdrawal capacity from both lakes is adequate to meet average day demands until about 2020. CMU has requested an increase from the Federal Energy Regulatory Commission (FERC) to increase their Mountain Island Lake withdrawal capacity. The requested increase from 165 mgd to 330 mgd (instantaneous maximum) will meet projected 2030 demands and add pumping flexibility.

The transfer of water will benefit the Mecklenburg County region by guaranteeing water to support the economic development and associated population growth that has occurred and projected to occur in this region of the State.

Based on the record the Commission finds the transfer is necessary to supply water to the growing communities of this area. Water from the source basin is readily available and within a short distance from the service area. Therefore the transfer is a reasonable allocation to these communities. The transfer will greatly benefit these communities by providing raw water of high quality for residential and industrial purposes.

(2) **Detrimental Effects on the Source Basin**

In order to assess the direct impacts of the proposed transfer on the source basin, the petitioners utilized Duke Energy's Hydro-Electric Operations and Planning Model of the Catawba-Wateree Project. The Catawba-Wateree model simulates reservoir operations and withdrawals from Lake James in North Carolina to Lake Wateree in South Carolina (see the following figure the *Catawba-Wateree River System*). Details of the modeling analysis are included in this report Part V Applicant Supplemental Information.

[IMAGE OMITTED]

As required under G.S. 143-215.22I(f)(2), local water supply plans were considered in developing the model. In addition, industrial and agricultural withdrawals were model inputs. Model runs were evaluated for present conditions, 2030 CMU water demands, and cumulative 2030 water demands.

As seen in the following table, a summary of daily releases from Lake Wylie, the transfer will have minimal impact on low flows. Similarly the model results show minimal impacts to both lake levels and hydropower generation.

[TABLE OMITTED]

Based on the modeling results the Commission finds that the detrimental effects on the source basin described in G.S. §143-215.22I(f)(2) will be insignificant.

(2a) **Cumulative effect on Source Basin of any transfers or consumptive water use projected in local water supply plans**

Local water supply plan data, including current and projected water use and water transfers, were used to develop the input data sets for the model discussed in Finding Number 2. The model was used to evaluate current and future scenarios of basin water use.

The safe yield of the reservoir system has not been determined. Duke Power does not have a policy on reallocation of power pool storage to water supply, for example unlike the Corps of Engineers. However, based on two 2030 model scenarios and current drought operations, the safe yield is at least as large or larger than the cumulative 2030 scenario of 624 mgd.

Based on the modeling discussed in Finding No. 2, the Commission finds the cumulative effects of this and other future water transfers or consumptive uses as described in G.S. §143-215.22I(f)(2a) will be insignificant.

(3) **Detrimental Effects on the Receiving Basin**

The proposed transfer will utilize existing permitted wastewater discharges to the Rocky River basins; therefore no additional permitted capacities will be required. Previous studies for the existing plant indicated no significant direct water quality or wastewater assimilation on the receiving stream. Additional growth and development in the receiving

basin may impact water quality, stormwater runoff, frequency and intensity of flooding, and land use.

The Goose Creek watershed in Mecklenburg County was removed from the area to be served by this transfer certificate until the impacts of additional urban growth on Federally listed endangered mussel specifies are fully evaluated.

Based on the record the Commission finds the transfer will support continued population growth and the attendant impacts of that growth. These impacts include effects on wastewater assimilation, fish and wildlife habitat, and water quality. However, these impacts will be minimal. Reasonable mitigation includes:

1. *Require the County to evaluate the feasibility of each element of the Surface Water Improvement and Management Program (SWIM) on an annual basis.*
2. *Require the County and the Town of Mint Hill to consider the conclusions of Wildlife Resources Commission's Goose Creek watershed study when complete.*
3. *Require Mecklenburg County and the City of Charlotte to continue the stakeholder process to investigate water quantity control from single-family development and water quality control for all development.*
4. *The Goose Creek subbasin in Mecklenburg County is removed from the area to be served by the IBT. A moratorium on the installation of new IBT water lines into Goose Creek subbasin is in effect until the impacts of additional growth urban growth on the endangered specifies are fully evaluated.*

(4) **Alternatives to Proposed Transfer**

The petitioners evaluated three alternatives to the proposed transfer. The alternatives considered included:

1. No Action – Growth would be served by individual wells and septic tanks. The region is already experiencing water quality problems related septic tanks and package sewage plants. Also, a number of individual wells in this region have both low yields and poor water quality.
2. Obtain Water from the Rocky River – New reservoir project. Development of new impoundments for water supply in rapidly developing urban area face significant regulatory requirements and considerable public controversy.
3. Return wastewater discharge to the Catawba – Return wastewater to the McAlpine WWTP. Returning water to the Catawba would increase McAlpine's discharge by 17 mgd. SC DHEC considers the McAlpine plant to be a significant contributor to phosphorus in the Catawba basin already at it's current discharge level.
4. Proposed Action. The proposed action of using the Mallard Creek WTTP and the Rocky Regional WTTP increases the existing discharge of 8 mgd to 18 mgd by 2030 into the Rocky River.

Based on the information provided in the EA and the petition, the Commission finds that the proposed alternative is the most feasible means of meeting the petitioners' long-term water supply needs while minimizing overall impacts and cost.

(5) **Impoundment Storage**

This criterion is not applicable, as the petitioners do not have an impoundment.

(6) **The water to be withdrawn or transferred is stored in a multipurpose reservoir constructed by the United States Army Corps of Engineers**

This criterion is not applicable, as the petitioners are using storage in Duke Power reservoirs.

(7) **Other Considerations**

The Commission finds that to protect the source basin during drought conditions, to mitigate the future need for allocations of the limited resources of this basin, and as authorized by G.S. § 143-215.22I(h), a drought management plan is appropriate. The plan should describe the actions that the Charlotte-Mecklenburg Utilities will take to protect the Catawba River Basin during drought conditions.

The Commission notes that future developments may prove the projections and predictions in the EIS to be incorrect and new information may become available that shows that there are substantial environmental impacts associated with this transfer. Therefore, to protect water quality and availability and associated benefits, modification of the terms and conditions of the certificate may be necessary at a later date.

Decision

Based on the hearing record and the recommendation of the hearing officers, the Commission, on March 14, 2002 by duly made motions concludes that by a preponderance of the

evidence based upon t. Findings of Fact stated above that (1) the benefits of the proposed transfer outweigh the detriments of the proposed transfer, and (2) the detriments of the proposed transfer will be mitigated to a reasonable degree. Therefore, and by duly made motions, the Commission grants the petition of the Charlotte-Mecklenburg Utilities (with conditions) to increase their transfer of water from the Catawba River basin to the Rocky River basin. The permitted transfer amount shall be 33 million gallons per day (mgd) on a maximum day basis from the effective date. This certificate is effective immediately. The certificate is subject to the following conditions, imposed under the authority of G.S. § 143-215.22I:

1. Require Mecklenburg County to summarize progress in implementation of watershed management approaches of the Surface Water Improvement and Management Program (SWIM) on an annual basis. The Division of Water Resources shall have the authority to approve modifications to and need for continued reporting as necessary.

2. Require Mecklenburg County and the City of Charlotte to continue the stakeholder process to investigate water quantity control from single-family development and water quality control for all development until completed. To accomplish this end, the stakeholder group should consider evaluating the feasibility of single-family detention and recommending ordinance revisions based on technical, political, long-term maintenance, cost, and benefits related to the proposed ordinance changes.

3. The Goose Creek subbasin in Mecklenburg County is removed from the area to be served by the IBT. A moratorium on the installation of new interbasin transfer water lines (water lines crossing the ridgeline) into Goose Creek subbasin is in effect until the impacts of additional growth urban growth on the endangered species are fully evaluated. This moratorium will not impact Charlotte-Mecklenburg Utility's ability to fully utilize existing water lines. The Division of Water Resources shall have the authority to grant exemptions for reasons of public health and safety for dwellings existing on or before March 14, 2002.
4. If either the EA is found at a later date to be incorrect or new information becomes available such that the environmental impacts associated with this transfer are substantially different from those projected impacts that formed the basis for the above Findings of Fact and this certificate, the Commission may reopen the certificate to adjust the existing conditions or require new conditions to ensure that the detriments continue to be mitigated to a reasonable degree.
5. Require the applicant to develop a compliance and monitoring plan for reporting maximum daily transfer amounts, compliance with certificate conditions, progress on mitigation measures, and drought management activities. The Division of Water Resources shall have the authority to approve modifications to the compliance and monitoring plan and drought management plan as necessary.

This is the 14th day of March, 2002.

/s/ DAVID H. MOREAU

David H. Moreau, Chairman

No. 138, Original

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IN THE
Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To Intervene

BRIEF OF THE STATE OF SOUTH CAROLINA IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE OF THE CITY OF CHARLOTTE, NORTH CAROLINA

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February 25, 2008

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INTRODUCTION

This is a dispute between two States. South Carolina seeks an equitable apportionment of the Catawba River and an injunction preventing North Carolina from authorizing transfers out of that river and other uses inconsistent with that apportionment. The City of Charlotte, North Carolina, is now the third user of water from the Catawba River that seeks to intervene in this case. If Charlotte's motion were granted, it surely will not be the last, as more of the entities that rely upon water from the Catawba River decide that they, too, have "unique" interests that put them "in a class by [them]sel[ves]." *See* Catawba River Water Supply Project Mot. 12; Duke Mot. 3; Charlotte Mot. 17.

But this Court has already rejected precisely the same claims, holding in *New Jersey v. New York*, 345 U.S. 369 (1953) (per curiam), that municipalities may not intervene in equitable apportionment actions because, in such "matter[s] of sovereign interest," the party States "'must be deemed to represent all [their] citizens.'" *Id.* at 372-73 (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930)). The City of Charlotte – like Duke Energy Carolinas, LLC ("Duke") and the Catawba River Water Supply Project (the "Project") – has provided no basis for departing from that rule. Allowing Charlotte to intervene would leave the Court with no principled or practical stopping point to exclude the countless other water users in North Carolina and South Carolina that rely upon the Catawba River. Such interventions significantly expand the administrative complexity of this original case "to the dimensions of [an] ordinary class action[]." *Id.* at 374. Because Charlotte's interests are conclusively represented by North Carolina, the motion to intervene should be denied.

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ARGUMENT

THE COURT SHOULD DENY CHARLOTTE'S MOTION TO INTERVENE

A. Charlotte's Interests Are Conclusively Represented By North Carolina

It is fundamental that original actions seeking the equitable apportionment of an interstate stream serve to adjudicate the rights of the party States *as between each other* and not among individual water users within those States. Indeed, this Court has "said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States." *Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106-08 (1938); *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932).

This Court appears never to have permitted a private person or non-sovereign entity, including municipal entities that supply water to local residents, to intervene in an original equitable apportionment action. *See, e.g., Nebraska v. Wyoming*, 296 U.S. 548 (1935) (order denying motion of Platte Valley Public Power & Irrigation District for leave to intervene); *Arizona v. California*, 345 U.S. 914 (1953) (denying motion of Sidney Kartus *et al.* for leave to intervene). Rather, equitable apportionment cases present "matter[s] of sovereign interest," and, as to such matters, it "is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration," that a State "must be deemed to represent all its citizens." *New Jersey v. New York*, 345 U.S. at 372-73 (internal quotation marks

omitted). "Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.* at 373.

In *New Jersey v. New York*, the Court denied the City of Philadelphia's motion for leave to intervene, reasoning:

> The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters. If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth. Furthermore, we are told by New Jersey that there are cities along the Delaware River in that State which, like Philadelphia, are responsible for their own water systems, and which will insist upon a right to intervene if Philadelphia is admitted. . . . Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions.

Id. (footnote omitted).[1]

Those considerations compel denial of Charlotte's motion. Indeed, Charlotte invites the Court to take up precisely the kind of "intramural dispute over the distribution of water within" a State that the Court

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[1] The Court denied Philadelphia's motion to intervene despite a "Home Rule Charter" granted by the Commonwealth, making Philadelphia "responsible for her own water system." 345 U.S. at 374. As the Court explained, that responsibility is "suitably served by the Commonwealth's position." *Id.*

refused to entertain in *New Jersey v. New York*. *Id.* In attempting to establish that its interests cannot be adequately represented by North Carolina, Charlotte points out only "one clear difference" between its own interests and North Carolina's: "North Carolina . . . must balance the multiple interests of all upstream and downstream users of the River in the State whereas Charlotte's interests are exclusively downstream." Mot. 19 (internal quotation marks omitted). That "difference" of interests, however, represents a purely intrastate struggle. *New Jersey v. New York* holds that a municipality's interest in winning that kind of intramural dispute is not a proper basis upon which to intervene in an original action.[2]

Rather, this Court has made clear that allocations of water *within a State* are necessarily constrained by the apportionment decrees dividing river water *between States*. *See Hinderlider*, 304 U.S. at 106

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[2] The lower court decisions upon which Charlotte relies are inapposite, as those cases did not involve the proper scope of this Court's original jurisdiction. Indeed, as the district court acknowledged in *Alabama v. United States Army Corps of Engineers*, 229 F.R.D. 660 (N.D. Ala. 2005), upon which Charlotte relies, the jurisdiction of the district and circuit courts long has been "expanded to the dimensions of ordinary class actions." *New Jersey v. New York*, 415 U.S. at 373; and thus "a party seeking to intervene in a suit before a district court need only make a 'minimal' showing of inadequate representation." 229 F.R.D. at 674. Moreover, the Eighth Circuit's decision in *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), held that the Army Corps of Engineers could not adequately represent, *parens patriae*, the interests of the State of Nebraska because the Corps was charged with representing *both* the upstream interests of South Dakota and the downstream interests of Nebraska. No question was presented as to whether Nebraska could properly represent the water rights of its own citizens.

(holding that an "apportionment [by this Court] is binding upon the citizens of each State and all water claimants," even where the State had previously allocated state-law water rights among individual claimants); *see also Nebraska v. Wyoming*, 515 U.S. at 22. Thus, as to the equitable share between the party States, the rights of a municipality – regardless of its authority granted under state law – "can rise no higher than those of [the party State], and an adjudication of the [State's] rights will necessarily bind [it]." *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935).

In rejecting Philadelphia's intervention motion in *New Jersey v. New York*, 345 U.S. at 373, this Court relied on *Kentucky v. Indiana*, which provides especially pertinent guidance here. *See* 281 U.S. at 173. In the *Kentucky* case, the party States had agreed to an interstate compact to build a bridge across the Ohio River. Indiana citizens sought to enjoin construction of the bridge in Indiana state court, and the resulting delay caused Indiana to breach the compact. After Kentucky invoked this Court's original jurisdiction to seek specific performance, Indiana answered that "[t]he State of Indiana believes said contract is valid" and that the "only excuse" it had for delaying its performance was the state-court litigation initiated by its citizens. *See id.* at 169-71. This Court granted Kentucky's requested relief, including enjoining the Indiana state-court litigation, holding that

> [a] state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens. The appropriate appearance here of a state by its proper officers, either as complainant or defendant, is conclusive upon this point.

Id. at 173. Were it "[o]therwise," the Court explained, "all the citizens of both states, as one citizen, voter and taxpayer has as much right as another in this respect, would be entitled to be heard." *Id.*

As with the Project's motion, the principles set forth in these cases foreclose Charlotte's arguments for intervention. As *Kentucky v. Indiana* makes clear, Charlotte's own view of how water should be allocated within North Carolina would have no bearing on the Court's resolution of this case, for the position taken by North Carolina as to the content of its own law, and Charlotte's rights thereunder, will be conclusive. Notably, the State of North Carolina, for its part, disagrees with Charlotte's submission that the State "cannot, or will not[,] represent the interests of Charlotte in this litigation." Brief of North Carolina in Response to Charlotte's Motion for Leave To Intervene 2 ("NC Br."). That alone disposes of Charlotte's claimed need to intervene; the only remaining purpose to be served by Charlotte's intervention would be to provide duplicative support for North Carolina's defense.

Moreover, although Charlotte claims (at 17) that its sheer "size and [Interbasin Transfer] Certificate place [it] in a class by [it]self," Charlotte is by no means unique in its dependence upon the Catawba River for water. Charlotte is now the *third* would-be intervenor to claim a unique interest in the waters of the Catawba River. *See* Project Mot. 12; Duke Mot. 3. If the Court were to grant Charlotte's motion, then it would seem inevitable that many more such motions will follow; "there would be no practical limitation on the number of [water users], as such, who would be entitled to be made parties." *New Jersey v. New York*, 345 U.S. at 373. (And Charlotte's size hardly provides a principled basis for denying inter-

vention to otherwise similarly situated municipalities.) Thus, Charlotte's motion, like those of the Project and Duke, "demonstrates the wisdom of the rule" against intervention in equitable apportionment actions. *Id.*

B. The Precedents Cited By Charlotte Are Inapposite

Charlotte, like Duke and the Project, has not cited a single equitable apportionment action in which a municipality or private party has been permitted to intervene. Rather, Charlotte relies on cases in which cities "have been parties in original actions commenced by States." Mot. 10-11, 14 (citing *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *New Jersey v. New York*, *supra*; *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924); *Missouri v. Illinois*, 180 U.S. 208 (1901); *Wisconsin v. City of Duluth*, 96 U.S. 379 (1877)). But, as Charlotte acknowledges (at 14), in these cases the cities were not permitted to intervene, but rather were named by the plaintiff as party defendants and were thus *compelled* to join. In *New Jersey v. New York*, the Court found that difference to be of critical importance:

> The presence of New York City in this litigation is urged as a reason for permitting Philadelphia to intervene. But the argument misconstrues New York City's position in the case. New York City was not admitted into this litigation as a matter of discretion at her request. She was forcibly joined as a defendant to the original action since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey.

345 U.S. at 374-75.

Charlotte emphasizes that it is the holder of one of the interbasin transfer permits to which South Carolina objects and that, like New York City in *New Jersey v. New York*, it is thus an agent of the injury complained of here. But the Court in *New Jersey v. New York* gave no indication that status as an agent of injury would provide a ground for intervention "as a matter of discretion," *id.*, nor does any such indication appear in *Missouri v. Illinois*, 180 U.S. at 242, which Charlotte also cites (at 14). To the contrary, the Court's opinion in *New Jersey v. New York* strongly implies that New York City would not have been permitted to *intervene*, even though because it was named as a defendant it was allowed to remain a party "subordinate to the parent state as the primary defendant," given that its presence "raise[d] no problems under the Eleventh Amendment." 345 U.S. at 375.

Moreover, contrary to Charlotte's argument (at 14) that "[t]he instant action is incomplete without Charlotte," South Carolina had no reason to name Charlotte as a defendant in this case. When *New Jersey v. New York* was filed in 1929 (as when *Missouri v. Illinois* was filed in 1900), it was unclear whether individual water-rights claimants would be bound by the results of an original action if they were not joined by the plaintiff as party defendants. *See Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (raising but not deciding whether individual water-rights claimants in the defendant State should be joined as party defendants by the plaintiff State). "Not surprisingly, the practice soon developed of joining persons or entities within the defendant state whose claims appeared to be at stake." 4 Robert E. Beck et al., *Waters and Water Rights* § 45.03(b), at 45-20 (1991 ed., 2004 replace. vol.) ("Beck"). In 1932, how-

ever, the Court's decision in *Wyoming v. Colorado* resolved that issue, holding that an apportionment by this Court is binding upon all "water claimants" in both of the party States. *See Wyoming v. Colorado*, 286 U.S. at 508-09; *Nebraska v. Wyoming*, 295 U.S. at 43. Since then, "individual water claimants usually have not been joined in equitable apportionment suits." 4 Beck § 45.03(b), at 45-21. Thus, the now-outdated precautionary practice of naming municipalities as defendants provides Charlotte no justification for seeking permission to intervene here.

Charlotte points to only one original action in which a city has been permitted to intervene, *see Texas v. Louisiana*, 416 U.S. 965 (1974), but in that case the motion to intervene was unopposed, *see* Brief of the United States in Opposition to the City of Port Arthur's Motion for a More Definite Statement at 2, No. 36, Orig. (filed Apr. 23, 1974). The Court there disposed of the motion in a one-line order and without explanation. In any event, *Texas v. Louisiana* did not involve an equitable apportionment of an interstate stream; rather, as the Court later explained, the City of Port Arthur "was permitted to intervene for purposes of protecting its interests in [certain real property]," to which the United States also claimed title. *Texas v. Louisiana*, 426 U.S. 465, 466 (1976) (per curiam). In that circumstance, the United States's non-opposition to Port Arthur's motion likely was dispositve. *Texas v. Louisiana* provides no suggestion that the Court intended to depart from the rule established in *New Jersey v. New York*, which controls in this equitable apportionment action.

C. Charlotte's Claimed Rights Under The CRA Are Irrelevant

Charlotte's claimed rights under the Comprehensive Relicensing Agreement ("CRA") pursuant to which Duke has applied for a new license for its hydroelectric projects on the Catawba River do not support Charlotte's intervention motion. As South Carolina explained at pages 6-7 of its opposition to Duke's motion, the CRA expressly disclaims resolution of the water rights issues raised in this case. Moreover, as Charlotte acknowledges (at 9), there are "68 other parties" to the CRA and, under Charlotte's reasoning, each may be presumed to claim an entitlement to intervene. Perhaps attempting to mitigate the inevitable extension of its argument, Charlotte notes (at 10) that "South Carolina has brought this action in *parens patriae*, and therefore represents all of the 28 South Carolina parties to the CRA." The truth of that statement also establishes that North Carolina similarly represents Charlotte's interests here.

Charlotte's argument as to how its interests under the CRA diverge from North Carolina's stretches logic to the breaking point. Charlotte argues (at 19-20) that it should be permitted to intervene because it is "not constrained," as is the State of North Carolina, by section 401 of the Clean Water Act – which requires North Carolina to certify that discharges into navigable waters will not violate water-quality standards, 33 U.S.C. § 1341. North Carolina itself disagrees with that assertion. *See* NC Br. 2. It would be anomalous to suppose that any asserted interest Charlotte could claim in *violating* the water-quality standards under the Clean Water Act forms a legitimate basis for the City to intervene in this action.

D. Charlotte's Interests Can Be Protected In Ways Short Of Full Party Status

Like the other would-be intervenors, Charlotte fails to explain why its participation as *amicus curiae* would be insufficient to assert its interests. If its interests are as significant as it asserts, the City will surely exercise important influence over North Carolina in the litigation of this action. And such influence will not come at the expense of any *amicus* brief Charlotte might file as to any appropriate dispositive motion. The Court need not grant Charlotte full party status in this original action for the City to protect any interests not fully represented by North Carolina. *See also* Brief of South Carolina in Opp. to Duke Motion To Intervene 14.

CONCLUSION

The City of Charlotte's motion for leave to intervene should be denied.

Respectfully submitted,

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February 25, 2008

No. 138, Original

In the

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to Intervene and File Answer

BRIEF OF THE STATE OF NORTH CAROLINA IN RESPONSE TO THE CITY OF CHARLOTTE'S MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

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INTRODUCTION

This action was brought by the State of South Carolina against the State of North Carolina, invoking this Court's original jurisdiction and alleging that interbasin transfers ("IBTs") from the Catawba basin approved by the State of North Carolina have exacerbated harms caused by drought in some locations downstream in South Carolina and have exceeded North Carolina's equitable portion of the water of the Catawba River. The City of Charlotte ("Charlotte") now seeks to intervene as a defendant, contending, *inter alia*, that Charlotte is a target of South Carolina's claims and that Charlotte's interests differ from the State of North Carolina's interests. *See* Motion for Leave to Intervene of the City of Charlotte, North Carolina and Brief in Support of Motion ("Charlotte's Motion to Intervene"), p. 10.

Charlotte clearly has a significant interest in the outcome of this case. North Carolina files this response for the limited purpose of addressing two specific statements in Charlotte's Motion to Intervene.

ARGUMENT

The State of North Carolina agrees that Charlotte is the largest municipality on the Catawba River and the largest provider of water supply and wastewater treatment services in the Catawba River basin. Accordingly, Charlotte certainly has a strong interest in the outcome of this case.

1. The State of North Carolina agrees with Charlotte that the State must represent the interests of every person that uses water from the North Carolina portion of the Catawba River basin. In fact,

the State has a particular concern for its political subdivisions, such as Charlotte, which actually operate the infrastructure to provide water to the State's citizens. N.C. Gen. Stat. § 143-355(*l*). Charlotte has been granted authority by the State to make IBTs. See N.C. Gen. Stat. § 143-215.22I (repealed August 2, 2007). The State has every reason to defend the IBTs that it has authorized for the benefit of its citizens. The State cannot agree with any implication that because it represents all of the users of water in North Carolina it cannot, or will not represent the interests of Charlotte in this litigation initiated by South Carolina.

2. North Carolina cannot agree with the suggestion that the State's actions under Section 401 of the Clean Water Act, 33 U.S.C. § 1341 ("CWA"), will somehow constrain the State from defending and securing the full range of benefits under the Comprehensive Relicensing Agreement for the Catawba-Wateree Hydroelectric Project ("CRA"). *See* Charlotte's Motion to Intervene, pp. 19-20. As reflected in CRA § 19.3, the State is authorized to issue a water quality certification, which must include conditions the State deems necessary to assure compliance with water quality standards and other requirements included within Section 401. The water quality standards and certification requirements under the CWA, however, do not impair the right or jurisdiction of the State with respect to its waters, including boundary waters, *see* 33 U.S.C. § 1370, and do not prevent the State of North Carolina from "defending and securing the full range of benefits" accruing to the State of North Carolina under the CRA. The provision of the CRA on which Charlotte

relies is only a reservation of North Carolina's right to issue a Section 401 certification and specifically negates any assertion that by entering into the CRA North Carolina has limited this statutory right. The reservation does not have any bearing on the State's willingness or ability to defend this action vigorously on behalf of all of its citizens and municipalities.

CONCLUSION

The State of North Carolina takes no position with respect to Charlotte's Motion to Intervene, except to clarify the two specific points set out in this response.

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No. 138, Original

IN THE

Supreme Court of the United States

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Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave to Intervene

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INTRODUCTION

Both Carolinas have responded to Charlotte's motion to intervene. South Carolina opposes Charlotte's intervention but does not dispute that Charlotte has a strong interest in this litigation. North Carolina does not oppose Charlotte's motion and affirmatively agrees with Charlotte's assessment of the magnitude of her interest in the litigation. *See* N.C. Brief at 1 ("Charlotte clearly has a significant interest in the outcome of this case."); *id.* ("Charlotte certainly has a strong interest").

There is no dispute that Charlotte, by virtue of its Inter-Basin Transfer (IBT) Certificate, is the entity vested with the legal authority to carry out the large majority of the IBTs that South Carolina objects to and seeks to curtail in this action. Nor is there any dispute that Charlotte is one of the principal stakeholders in the Comprehensive Relicensing Agreement—the carefully negotiated contract regarding the relicensing of Duke Energy's hydroelectric power facilities. Finally, there is no dispute that the City of Charlotte, which serves a population of more than 800,000 persons, is by far the largest municipality and largest provider of water supply and wastewater treatment services in the Catawba River Basin. Given Charlotte's significant, undisputed interests, her motion to intervene should be granted.

ARGUMENT

I. THERE IS NO RULE BARRING CHARLOTTE'S INTERVENTION IN THIS ORIGINAL ACTION.

South Carolina makes much of the fact that Charlotte "has not cited a single equitable apportionment action in which a municipality or private party has

been permitted to intervene." S.C. Opp. at 7. *See also id.* at 2 ("This Court appears never to have permitted a private person or non-sovereign entity * * * to intervene in an original equitable apportionment action."). South Carolina's suggestion that there is an unstated rule barring intervention—except by sovereign entities—in equitable apportionment cases is fanciful. This Court has never articulated such a rule. Nor has it ever suggested the principles guiding intervention operate differently in equitable apportionment cases than in other original jurisdiction cases.

The Court has permitted intervention in equitable apportionment cases. *See Arizona* v. *California*, 460 U.S. 605, 613-615 (1983). It has permitted a city to intervene in an original action. *See Texas* v. *Louisiana*, 426 U.S. 465, 466 (1976). And it has permitted a large city to be a party in an equitable apportionment case. *See New Jersey* v. *New York*, 283 U.S. 336 (1931). Thus, no principled basis exists for extracting from the Court's cases an unstated rule that a municipality cannot intervene in an equitable apportionment case. [1]

South Carolina does not even abide by its own proposed distinction between equitable apportionment cases and other original actions. In opposing Charlotte's motion, South Carolina relies on original

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[1] South Carolina claims that *New Jersey* v. *New York*, 345 U.S. 369 (1953) (*per curiam*), holds "that municipalities may not intervene in equitable apportionment actions." S.C. Opp. at 1. The opinion contains no such holding. And the subsequent case of *Texas* v. *Louisiana*, 426 U.S. 465 (1976), confirms that there is no *per se* rule against intervention by cities in original actions.

jurisdiction cases outside of the equitable apportionment context. *See, e.g.*, S.C. Opp. at 5 (asserting that *Kentucky* v. *Indiana*, 281 U.S. 163 (1930), which is not an equitable apportionment case, "provides especially pertinent guidance here").

II. CHARLOTTE SHOULD BE ALLOWED TO INTERVENE EVEN THOUGH NORTH CAROLINA IS A PARTY.

South Carolina's opposition to Charlotte's intervention is based primarily on this Court's denial of Philadelphia's two-decades late motion to intervene in *New Jersey* v. *New York*, 345 U.S. 369 (1953) (*per curiam*) (*New York*), but that case actually supports Charlotte's intervention.

Philadelphia argued that she should be allowed to intervene because New York City was already present in the case as a party. *See id.* at 374. Rejecting the argument, this Court explained that New York City was a proper party in the case because, unlike Philadelphia, New York City "was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey." *Id.* at 375. Here, Charlotte stands in the shoes of New York City, not Philadelphia. Charlotte is the governmental entity authorized to execute the bulk of the certificated IBTs that South Carolina claims are injurious. *See also Missouri* v. *Illinois*, 180 U.S. 208, 242 (1901) (Chicago Sanitary District was proper party defendant in original action because it was "an agency of the state to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended").

Charlotte also differs from Philadelphia in that Pennsylvania *opposed* Philadelphia's proposed

intervention. *See New York*, 345 U.S. at 372 ("All of the present parties to the litigation have formally opposed the motion to intervene * * *."). In contrast, North Carolina has not opposed Charlotte's motion. *See* N.C. Brief at 3 ("North Carolina takes no position with respect to Charlotte's Motion to Intervene"). The opposition of Philadelphia's home State (not to mention every other party) to Philadelphia's motion was surely a significant factor in the Court's decision to deny intervention. *See New York*, 345 U.S. at 373 (observing that the principle of *parens patriae* "is a necessary recognition of sovereign dignity").

In addition, South Carolina makes no mention of the fact that Philadelphia's motion to intervene was untimely—by at least 20 years. The *New York* case was commenced by New Jersey in 1929. Pennsylvania successfully intervened in 1930. Philadelphia did not move to intervene until 1952. *See* Charlotte Motion at 15-16. Here, South Carolina does not contend that Charlotte's motion to intervene is untimely. *See id.* at 20-21 (explaining why Charlotte's motion is timely).

South Carolina also relies on *Kentucky* v. *Indiana*, 281 U.S. 163 (1930), but that reliance is misplaced. Kentucky there filed a bill of complaint against Indiana to enforce a contract between the two States. Kentucky also named as defendants nine individual Indiana citizens and taxpayers who had filed a lawsuit in Indiana state court to enjoin the contract. This Court dismissed the bill as against the nine individual defendants, explaining that

> *there is no showing that the individual defendants have any interest whatever* with respect to the

> contract and its performance *other than that of the citizens and taxpayers, generally*, of Indiana, an interest which that state in this suit fully represents. [*Id.* at 174 (emphases added).]

Here, it cannot be said that Charlotte's interest is merely the general interest of a North Carolina citizen or taxpayer. *See* Charlotte Motion at 2-10; Introduction, *supra*.

South Carolina leans heavily upon the *New York* Court's statement that "[a]n intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." 345 U.S. at 373. [2]

Charlotte clearly has a "compelling interest in [her] own right" in this litigation—a compelling interest that is above and beyond the interest of "all other citizens and creatures of the state." Indeed, the magnitude of Charlotte's interest in withdrawals from the Catawba River is greater than that of all other municipal water supply providers in North Carolina combined. *See* Charlotte Motion at 2-10; Introduction, *supra*. Furthermore, Charlotte's interest is not a duplicate of North Carolina's interest. [3]

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[2] South Carolina asserts that Charlotte's interests are "conclusively" represented by North Carolina. S.C. Opp. at 1, 2, but this Court has set no such standard. Rather, it has described the legal principle at issue as a "general rule" and a "presum[ption]." *Nebraska* v. *Wyoming*, 515 U.S. 1, 21 (1995).

[3] This Court has indicated, in the intervention context, that the concept of adequacy of representation by existing parties

First, courts have recognized (even if North Carolina does not [4]) that a governmental entity charged with representing all users along a river has an interest different from the interest of a downstream user. *See South Dakota* v. *Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003), *cert. denied*, 541 U.S. 987 (2004); *Alabama* v. *U.S. Army Corps of Eng'rs*, 229 F.R.D. 669, 675 (N.D. Ala. 2005). Within North Carolina, the City of Charlotte, which sits on the border between the Carolinas, is a downstream user of the Catawba River. Thus, her interest is narrower than North Carolina's. South Carolina points out the obvious (*see* S.C. Opp. at 4 n.2)—that *South Dakota* and *Alabama* were not original actions—but those courts' observations regarding the different interest of a downstream user versus a government entity responsible for representing all users remain on point here.

Second, Charlotte differs from North Carolina in that Charlotte has no duties under Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341. North Carolina and South Carolina have misconstrued Charlotte's argument that North Carolina's Section

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should be regarded as a "minimal" burden. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (applying Fed. R. Civ. P. 24). This Court uses the Federal Rules of Civil Procedure, including Rule 24, as "guides" in original actions. S. Ct. R. 17.2. *See, e.g.*, *Arizona* v. *California*, 460 U.S. at 614-615 (permitting Indian tribes to intervene in original action and stating that "the Indian Tribes, at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules").

[4] North Carolina agrees that it "represents all of the users of water in" the State, but does not agree that it "will not represent the interests of Charlotte in this litigation." N.C. Br. at 2.

401 duties prevent it from adequately representing Charlotte's interest in protecting those water withdrawals and IBTs called for in the Comprehensive Relicensing Agreement (CRA). North Carolina argues that its CWA duties do not prevent it from "securing the full range of benefits accruing to the State of North Carolina under the CRA." N.C. Brief at 2. Charlotte does not disagree as to North Carolina's defense of *the State's* benefits, but rather that the State could not defend, without reservation, the benefits *Charlotte* bargained for in the CRA. South Carolina makes the nonsensical (and offensive) argument that Charlotte seeks intervention to protect its interest in violating the law. *See* S.C. Opp. at 10.

Pursuant to CWA Section 401, North Carolina has the authority to decide whether Duke's license, issued by the Federal Energy Regulatory Commission ("FERC") pursuant to the Federal Power Act, will comply with the State's water quality standards. *See* 33 U.S.C. § 1341(a)(1). In its certification of compliance for Duke's license, North Carolina must include "any effluent limitations or other limitations * * * necessary to assure that * * * [Duke] will comply with any * * * appropriate requirement of State law * * *." *Id.* § 1341(d). Of particular importance, such limitations may include conditions dictating how Duke operates its dams on the Catawba River, including any stream flow requirements that the State deems necessary to protect designated uses of the River or to comply with the State's water quality criteria. *PUD No. 1 of Jefferson County* v. *Washington Dep't of Ecology*, 511 U.S. 700, 711-723 (1994). Any required flows imposed by North Carolina

might, or might not, be consistent with the flows specified in the CRA.

As Charlotte has explained, the CRA specifies river flows and reservoir elevations that will accommodate Charlotte's water withdrawals and IBTs for the next 50 years. *See* Charlotte Motion at 3, 9. Those parameters establish the conditions under which Duke will operate its projects *unless* North Carolina changes those parameters pursuant to its Section 401 authority. Because North Carolina retains the authority under Section 401 to change the River flows that Duke must provide, it therefore has authority to affect the other parameters of the CRA that are interdependent with those flows, including Charlotte's water *withdrawals and IBTs* that otherwise would be assured under the CRA.

Accordingly, the CRA provides that "the State of North Carolina * * * do[es] not assent to any fact, opinion, approach, methodology, or principle, expressly identified or otherwise implied in this Agreement." CRA § 19.3. North Carolina's official position, as reflected in the CRA itself, is that, until it exercises its Section 401 authority, the State does not and cannot "assent to" the specific withdrawals and IBTs to which Charlotte would be entitled pursuant to that Agreement. North Carolina's litigating position, as expressed in its Response to Charlotte's Motion, cannot change that fact.

This conclusion is neither academic nor trivial. South Carolina claims that Charlotte's planned withdrawals and IBTs, even though provided for in the CRA, are "unlawful." *See* S.C. Complaint ¶¶ 20-24; S.C. Brief in Support of Motion for Leave to File

Complaint at 1.[5] South Carolina therefore seeks a decree from this Court that enjoins implementation of Charlotte's IBT. *See* S.C. Complaint, Prayer for Relief. Acting in its capacity as *parens patriae*, South Carolina thereby repudiates the CRA on behalf of over two dozen signatories from that State.[6] In response, North Carolina argues that Charlotte's IBTs are too small to harm South Carolina, and that this Court should wait to see whether FERC resolves South Carolina's issues and concerns by adopting the CRA, but North Carolina does not explain the extraordinary importance and value of CRA-recognized withdrawals and IBTs that Charlotte provides to hundreds of thousands of users in the largest metropolitan area in the Carolinas. *See* N.C. Opp. to S.C. Motion for Leave at 16.

Charlotte seeks intervention to do much more. If South Carolina can provide clear and convincing evidence that the Charlotte-dominated withdrawals and IBTs in North Carolina are causing injury of a serious magnitude to South Carolina's interests, the principles of equitable apportionment will take

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[5] While South Carolina highlights Charlotte's IBT of 43 million gallons per day (MGD), as well as the 10 MGD IBT granted to Concord/Kannapolis that Charlotte may be called upon to implement, it also complains about Union County's grandfathered IBT of 5 MGD. *See* S.C. Complaint ¶ 21.

[6] Two parties to the CRA, Lancaster County Water and Sewer District and Union County, also are participants in the Catawba River Water Supply Project ("CRWSP"). Those parties, through the CRWSP, are seeking to intervene as a defendant in this action and free themselves from the conflicting representation that South Carolina seeks to force upon the CRWSP and its participants—representation that is contrary to their commitments under the CRA.

center stage. Charlotte intends to fully support all pertinent flows, water uses and other aspects of the CRA by presenting, in detail, analyses of its present and future water needs and conservation programs, as well as the economic and societal value of water uses in its service area. In other words, Charlotte wishes to fully support the withdrawals and IBTs set forth in the CRA, which are the critical elements of that Agreement that South Carolina is attacking and North Carolina cannot "assent to" unless and until it completes its obligations under CWA Section 401.

Finally, *Arizona* v. *California*, 460 U.S. 605 (1983), supports Charlotte's intervention notwithstanding South Carolina's adequate representation argument. There, this Court allowed certain Indian Tribes to intervene in an equitable apportionment action. The United States did not oppose the Tribes' intervention, but the plaintiff State and all four defendant States opposed intervention "on grounds that the presence of the United States insures adequate representation of the Tribes' interests." *Id.* at 614. This Court rejected the argument, reasoning that "it is obvious that the Indian Tribes, at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules." *Id.* at 614-615. Charlotte, too, surely meets any test for permissive intervention. And, as in *Arizona* v. *California*, the party said to represent Charlotte's interests—North Carolina—does not oppose intervention, while the lone party opposing Charlotte's intervention—South Carolina—"ha[s] failed to present any persuasive reason why [its] interests would be prejudiced or this litigation unduly delayed by [Charlotte's] presence." *Id.* at 615.

III. PERMITTING CHARLOTTE TO INTERVENE WILL NOT LEAD TO A FLOOD OF INTERVENTION MOTIONS.

South Carolina asserts that if Charlotte's motion to intervene were granted, "then it would seem inevitable that many more such motions will follow." S.C. Br. in Opp. at 6. There is no reason to believe that "many more" Charlottes are waiting in wings. Charlotte is the largest city on the Catawba River, and it possesses the largest IBT Certificate. No other municipality in either Carolina can lay a claim to intervention equal to Charlotte's. No other city on the Catawba "could show comparable * * * magnitude of interest." *New York*, 345 U.S. at 376 (Jackson, J., dissenting). As a practical matter, participating as a party in this original action will require a significant commitment of resources, a commitment that Charlotte, given its keen interest in the matter at hand, is willing to make. It is far-fetched to think that "many more" municipalities will be willing to make similar expenditures.

South Carolina argued in December 2007 that the Catawba River Water Supply Project's motion to intervene would "open up the floodgates for numerous others to argue for intervention." S.C. Opp. to CRWSP Motion to Intervene at 7. Since then only one additional party—Charlotte—has moved to intervene. South Carolina's "floodgates" argument did not hold water then, and it does not hold water now. A grand total of three parties have moved to intervene in this case. Each has a substantial interest in the matter. Even if all of the pending motions to intervene were granted, this case would hardly possess "the dimensions of ordinary class actions." *New York*, 345 U.S. at 373.

IV. CHARLOTTE SHOULD BE ALLOWED TO PARTICIPATE AS A PARTY, NOT MERELY AN *AMICUS CURIAE*.

Finally, South Carolina suggests that Charlotte's motion should be denied because, in lieu of party status, Charlotte may file an *amicus* brief "as to any appropriate dispositive motion." S.C. Opp. at 11. Whether South Carolina is entitled to a decree equitably apportioning the Catawba River, and the content of any such decree, will turn on the factual record developed in this case. To participate fully in the development of that record, and to protect its substantial interests, Charlotte will require party, not *amicus*, status. Lobbing in the occasional *amicus* brief in reaction to "appropriate dispositive motion[s]" will not suffice. Under the circumstances, "the right to file a brief as *amicus curiae* is no substitute for the right to intervene as a party in the action." *Coalition of Arizona/New Mexico Counties for Stable Econ. Growth* v. *Dep't of the Interior*, 100 F.3d 837, 844 (10th Cir. 1996).

CONCLUSION

South Carolina asserts that "[t]his is a dispute between two States." S.C. Opp. at 1. But the two Carolinas are not the only ones with a dog in this fight. South Carolina's lawsuit threatens the water supply on which more than 800,000 people in Charlotte and its service area depend as well as all of the hard work that went into the Comprehensive Relicensing Agreement. In addition to the two States, others have significant interests in this litigation and deserve to be heard as parties. The City of Charlotte is one of them.

For the foregoing reasons, as well as those stated in Charlotte's motion for leave to intervene, Charlotte's motion should be referred to the Special Master and should be granted.

Respectfully submitted,

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MARCH 2008

No. 138, Original

IN THE

Supreme Court of the United States

October Term 2008

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

FIRST INTERIM REPORT OF THE SPECIAL MASTER

KRISTIN LINSLEY MYLES
Special Master

November 25, 2008

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IN THE

Supreme Court of the United States

October Term 2008

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

FIRST INTERIM REPORT OF THE SPECIAL MASTER

I.

In this original jurisdiction action, the State of South Carolina seeks an equitable apportionment of the Catawba River, which originates in the mountains of North Carolina and flows through the western portion of that state before passing into South Carolina at Lake Wylie. This Interim Report is submitted in connection with motions by the City of Charlotte, North Carolina ("Charlotte"), the Catawba River Water Supply Project ("CRWSP"), and Duke Energy Carolinas, LLC ("Duke Energy" or "Duke") to intervene in the action, as well as a motion by South Carolina for clarification or reconsideration of the Special Master's initial order granting the intervention motions. For the reasons set forth below,

the Special Master recommends that the proposed interventions be allowed.[1]

II.

This case began in June 2007 when the State of South Carolina filed a motion for leave to file its Complaint against the State of North Carolina. In the proposed Complaint, South Carolina sought an equitable apportionment of the Catawba River, and also sought to enjoin North Carolina from approving transfers of water from the Catawba River Basin to other river basins in a manner inconsistent with the requested apportionment. North Carolina opposed the motion, in part on the ground that the flow of the Catawba River was being addressed in proceedings before the Federal Energy Regulatory Commission ("FERC") relating to a relicensing application by Duke Energy. In August 2007, while South Carolina's motion for leave to file the Complaint was pending, South Carolina moved for a preliminary injunction to prevent North Carolina from authorizing transfers of water from the Catawba River beyond those previously authorized. North Carolina opposed that motion as well. On October 1, 2007, the Court granted South Carolina's motion for leave to file the Complaint, and directed North Carolina to file an Answer. On the same day, the Court denied South Carolina's motion for a preliminary injunction. North Carolina filed its Answer on November 30, 2007.

South Carolina's Complaint does not contain separate counts or causes of action. Rather, it sets out

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[1] For the convenience of the Court, the prior orders and other proceedings in this action can be accessed through the electronic docket maintained at http://www.mto.com/sm.

factual allegations concerning the Catawba River, including a general statement of the uses each State makes of the water from the river, facts concerning the flow of the river, and the prayer for an apportionment and for injunctive relief. South Carolina alleges that the Catawba River is used in both North and South Carolina for hydroelectric power, irrigation, mining, thermoelectric water use, water supplies, and other uses. Complaint ¶ 11. It alleges that the Catawba River Basin is a densely populated area that is expected to experience significant population growth over the next decade. It alleges that the Catawba is subject to severe periodic fluctuations in water level, and that its flow historically has been affected by prolonged droughts. *Id.* ¶ 15. South Carolina alleges that it and its citizens suffered harm as a result of conditions caused by a recent drought ending in late 2002. *Id.* ¶ 17.

South Carolina's Complaint and accompanying papers focus upon the role of the Catawba in generating hydroelectric power for use in both North Carolina and South Carolina—a topic that bears upon the intervention motion filed by Duke Energy. According to South Carolina, after efforts in the 19th century to make the river navigable proved unsuccessful, it became apparent that the most productive use of the river would be for electrical power. Motion for Leave to File Complaint at 3. The entity now known as Duke Energy was formed, principally to generate power for the region's cotton mills. *Id.* Duke Energy owns and operates a system of 11 reservoirs—six in North Carolina, four in South Carolina, and one at Lake Wylie, on the border between the two States—all of which are subject to a 50-year license issued to Duke Energy by the Federal Power Commission ("FPC") in 1958. *Id.* at 3-4.

South Carolina's Complaint also cites data generated as part of the above-referenced relicensing process pending before the FERC, the successor to the FPC. In anticipation of the need to renew its FPC license, which was to expire in 2008, Duke Energy initiated a multi-stakeholder negotiation process to address issues of concern to those using the Catawba, including issues of water level and flow. The result was a "Comprehensive Relicensing Agreement" ("CRA") among Duke and other stakeholders, including groups from both North and South Carolina, and specifically including the South Carolina Department of Natural Resources. Duke Energy submitted the CRA as part of its relicensing application, which remains pending before the FERC—Duke's original license having been extended by one year to allow for certain approvals necessary for the new license.

South Carolina alleges in its Complaint that, as part of the relicensing negotiations that led to the CRA, the various stakeholders agreed that the minimum continuous flow that South Carolina should receive from the Catawba River is 1,100 cubic feet per second—or about 711 million gallons per day. Complaint ¶ 15. South Carolina alleges that, because of the fluctuations in water supply in the river, the flow sometimes is below that level. *Id.* South Carolina alleges that a scientific model developed by Duke Energy as part of the relicensing negotiations showed that even in its "natural" state—that is, absent the reservoir system that currently exists—the river often would not deliver 1,100 cubic feet per second into South Carolina. *Id.* ¶ 16.

As for specific actions by North Carolina, the Complaint alleges that the harms to South Carolina from

reduced flow in the Catawba River have been exacerbated by a North Carolina statute, enacted in 1991, that requires a person or entity wishing to transfer 2 million or more gallons of water per day from specified river basins, including the Catawba, to obtain a permit from the North Carolina Environmental Management Commission ("EMC"). Complaint ¶ 18, citing N.C. Gen. Stat. §§ 143-215.22G(1)(h) & 143-215.22I(a)(1)-(2).[3] South Carolina alleges that this statute "implicitly authorize[s]" transfers of less than 2 million gallons "without regulation by the EMC." *Id.* South Carolina alleges that the EMC has granted at least two permits that allow the transfer of tens of millions of gallons of water per day from the Catawba to the Rocky River Basin—namely, a March 2002 permit allowing the Charlotte-Mecklenburg Utilities to transfer up to 33 million gallons per day, and a January 2007 permit allowing the Cities of Concord and Kannapolis to transfer up to 10 million gallons per day. *Id.* ¶ 20. South Carolina also points to an existing authorization to Union County to transfer at least 5 million gallons per day, and a pending application by Union County to increase that authorization by 13 million gallons per day. South Carolina alleges that it does not know the extent to which the North Carolina statute has "implicitly permitted" transfers under 2 million gallons a day, or the extent to which entities have taken advantage of an exception to the permitting requirement for transfers up to

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[3] In 2007, the North Carolina General Assembly repealed the 1991 statute cited by South Carolina in its Complaint, and replaced it with a new statute that imposes some additional requirements on applicants for interbasin transfers. *See* N.C. Gen. Stat. § 143-215.22L, effective August 31, 2007. The changes do not appear to be material for purposes of the present Report.

the full capacity of facilities that existed or were under construction as of July 1, 1993. *Id.* ¶¶ 22-23.

South Carolina alleges that these interbasin transfers from the Catawba have reduced the amount of water flowing into South Carolina and exacerbated the existing natural conditions and droughts that cause low flow conditions in South Carolina. South Carolina claims that the transfers also "are in excess of North Carolina's equitable share of the Catawba River." Complaint ¶ 24.

For its prayer for relief, South Carolina asks that the Court enter a decree "declaring that the North Carolina interbasin transfer statute cannot be used to determine each State's share of the Catawba River and equitably apportioning the Catawba River." South Carolina further seeks a decree "enjoining North Carolina from authorizing transfers of water from the Catawba River, past or future, inconsistent with that apportionment, and also declaring that the North Carolina interbasin statute is invalid to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment as determined by this Court's decree." Complaint at 10; *see also id.* ¶ 4.

In its Answer, North Carolina agrees that severe drought conditions have affected the flow of the Catawba and of other rivers in the two States, but denies that its own actions were the cause of any harms to South Carolina. Answer ¶¶ 2, 17-18. In particular, North Carolina denies that any such harms were exacerbated by the North Carolina statute regulating interbasin transfers, or that any transfers it authorized—including those to Charlotte-Mecklenburg and Union County—exceed North Carolina's equitable share of the Catawba River. *Id.* ¶¶ 3, 20(a), 21. It contends that the flows in the Catawba River fluctu-

ate "as a result of several factors, including requirements imposed pursuant to a license issued by [FERC] and the operation of hydroelectric generation facilities located on the River." *Id.* ¶ 2.

North Carolina asserts a series of affirmative defenses to South Carolina's claims, including that the issues raised by South Carolina are being addressed in the FERC proceedings relating to Duke's relicensing application, and that South Carolina's position amounts to "nothing more than a difference of opinion with the manner in which a FERC-regulated hydroelectric project stores and releases flows." Answer ¶ 32(a). North Carolina also alleges that the reduction in flow resulting from drought conditions is "avoidable by revisions to the operational parameters of the several hydroelectric dams that populate the Catawba River." *Id.* North Carolina alleges, based upon the existence of the FERC-regulated hydroelectric dams and other federal interests within the Catawba-Wateree-Santee River Basin, that the United States is an indispensable party to the litigation. *Id.* ¶ 36. To date, the United States has not sought leave to intervene in this action, nor has any party sought either to join it as a party or formally to request its views.

III.

In November 2007, Duke Energy and CRWSP filed motions for leave to intervene as defendants in this action. In February 2008, a third motion for leave to intervene as a defendant was filed by Charlotte. South Carolina opposed all three motions, and North Carolina took no position. The Special Master held a hearing on the three motions on March 28, 2008, in Richmond, Virginia, and, on May 27, 2008, issued an order granting the motions. On June 27, 2008, South

Carolina filed a motion for clarification or, in the alternative, for reconsideration of the May 27, 2008 order. The three parties who had successfully moved for intervention (the "Intervenors") opposed the motion. A Telephonic Conference was held on July 17, 2008 at which the Special Master indicated that the motion would be denied.

On July 30, 2008, South Carolina requested for the first time that the Special Master issue the May 27, 2008 order granting intervention, and any written order denying the motion for clarification or reconsideration of that order, as an Interim Report to this Court, so that South Carolina could present exceptions to these rulings. North Carolina and the Intervenors opposed the request. During a Telephonic Conference held on August 22, 2008, the Special Master indicated that she would grant South Carolina's request and submit an Interim Report on the subject of intervention.

In the meantime, discovery commenced, and the parties made progress on the preparation of a Case Management Plan to govern the action. Following the May 27, 2008 order granting intervention, discovery also began between the parties and the Intervenors. On September 18, 2008, in response to disputes among the parties and the Intervenors as to how to proceed pending this Court's consideration of the question of intervention, the Special Master issued an order governing discovery by and from the Intervenors pending proceedings in this Court.

A separate dispute arose and was resolved concerning the scope of the pleadings and of the issues open for discovery. North Carolina contended that South Carolina's Complaint was limited—and that discovery likewise should be limited—to the propriety

of North Carolina's practice of authorizing transfers of water from the Catawba River to other river basins in North Carolina. North Carolina further sought to limit South Carolina's case to the harms caused to South Carolina by interbasin transfers during times of drought, and on the portion of the Catawba upstream of Lake Wateree. South Carolina contended that its Complaint was not so limited, and that restrictions on discovery at this stage would not be appropriate. The Special Master resolved the dispute in an order dated September 24, 2008. The Special Master agreed with North Carolina that interbasin transfers were the central focus of the Complaint, and that the harms that South Carolina alleged focused primarily upon drought conditions and the upstream portion of the river as it flowed through South Carolina, but concluded that the general prayer for an equitable apportionment of the Catawba would permit consideration of other factors, so that a blanket limitation on discovery at the initial stage was not warranted.

IV.

In their original motions, the three Intervenors contended that they have substantial interests in this dispute and should be allowed to intervene. Two of the Intervenors, Charlotte and CRWSP, are entities authorized to carry out the inter-basins transfers to which South Carolina objects. Charlotte is the largest municipality on the Catawba and is the beneficiary of the March 2002 permit allowing Charlotte-Mecklenburg Utilities to transfer up to 33 million gallons per day. CRWSP is a joint venture between units of government of North and South Carolina. One of its two participants is Union County, North Carolina, which is authorized under the North Caro-

lina law to transfer up to 5 million gallons per day from the Catawba.

Duke Energy, the third Intervenor, owns and operates a system of 11 reservoirs in both States to provide hydroelectric power to the region, pursuant to its 50-year license issued by the FPC. In its original motion, Duke contends that the impounding of water in its reservoirs and its releases of that impounded water play a substantial role in determining the flow of the Catawba River. It also contends that the terms of its current and future licenses are crucial to any consideration by this Court of whether and how equitably to apportion the Catawba River. Duke asserts that its interests are not aligned with those of either State, but that it has a strong and unique interest in defending the conditions set forth in the CRA and also can provide an essential link to the ongoing licensing proceedings before the FERC.

As noted above, the Special Master initially granted the three motions to intervene in an order dated May 27, 2008. It was only after the parties had briefed South Carolina's motion for clarification or reconsideration of the May 27, 2008 ruling, and after the Special Master had indicated that the motion would be denied, that South Carolina formally requested that the Special Master issue the intervention ruling as an Interim Report to this Court. Accordingly, this Interim Report incorporates both the original rationale of the May 27, 2008 order and the ruling on the motion for clarification or reconsideration.

V.

Article III, § 2 of the Constitution gives the Court original jurisdiction of cases "in which a state shall be party." "This jurisdiction is self-executing, and needs

no legislative implementation." *California* v. *Arizona*, 440 U.S. 59, 65 (1979). Congress has expanded upon the original jurisdiction clause of Article III by providing in Section 1251(a) of Title 28 that the Court has "original and exclusive" jurisdiction of "all controversies between two or more States." 28 U.S.C. § 1251(a).

A state invokes the Court's original jurisdiction "as *parens patriae*, trustee, guardian, or representative of all or a considerable portion of its citizens," and may take actions to protect its citizens from injury to their property, health, and comfort. *Kansas* v. *Colorado*, 185 U.S. 125, 142 (1902). The *parens patriae* doctrine "is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all its citizens." *New Jersey* v. *New York*, 345 U.S. 369, 372 (1953). This principle is not only "a necessary recognition of sovereign dignity," but also "a working rule for good judicial administration." *Id.* at 373. "Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.*

The *parens doctrine* is directly implicated by actions between states to apportion waters from interstate rivers. Because states represent the interests of their citizens in equitable apportionment and other original actions, the citizens of a state that is a party to an original action are bound by the results of that action. Indeed, the Court has "said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their

respective States." *Nebraska* v. *Wyoming*, 515 U.S. 1, 22 (1995); *see also Wyoming* v. *Colorado*, 286 U.S. 494, 508-09 (1932).

These general principles, taken to their logical conclusion, could have produced a rule that only states—and not municipalities, private companies, or other interested entities—may be parties to an original action in this Court pursuant to Article III, § 2 of the Constitution and Section 1251(a) of Title 28. Nonetheless, neither text contains any such limitation, and the Court's practice has been to allow non-state entities in appropriate circumstances to join, or be joined in, an original action, even if the non-state entity is a citizen of one of the state parties and thus would be bound by the resulting judgment under the principles discussed above.

The Court considered this issue—and the appropriate standard for a motion by such an entity to intervene in an original action—in *New Jersey* v. *New York*, 345 U.S. at 369. That case involved a motion by the City of Philadelphia for leave to intervene in a case brought by the State of New Jersey against the State of New York and the City of New York to enjoin a proposed diversion of the Delaware River for use by the City of New York. At the outset of the case, the Commonwealth of Pennsylvania successfully petitioned the Court for leave to intervene as a plaintiff. *Id.* at 371. More than two decades later, after the City of New York moved to modify the decree entered in the case, Philadelphia filed its own motion for leave to intervene as a plaintiff. *Id.* The motion was opposed by the parties, in part on the ground that the presence of a non-state plaintiff (Philadelphia), seeking affirmative relief against a defendant state (New York), would violate the Eleventh Amendment.

The Court denied Philadelphia's motion, finding that "Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters." *New Jersey* v. *New York*, 345 U.S. at 373. The Court stated that if it "evaluate[d] all the separate interests within Pennsylvania," it could "be drawn into an intramural dispute over the distribution of water within the Commonwealth." *Id.* The Court also noted that, if Philadelphia intervened, other cities and private entities along the river would seek to do the same. *Id.* To prevent the Court's original jurisdiction from being "expanded to the dimensions of ordinary class actions," the Court held that a proposed intervenor such as Philadelphia must show "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.* at 373. Because Philadelphia was "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests," the Court denied the motion. *Id.* at 374.

The Court did not expand upon the types of interests that might be considered sufficiently compelling to warrant intervention. It did, however, distinguish the position of Philadelphia from that of the City of New York, which already was a party. As the Court explained, New York City "was forcibly joined as a defendant to the original action since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey." *New Jersey* v. *New York*, 345 U.S. at 375. Unlike Philadelphia, whose sole interest in the dispute was as a downstream user of water, and which

sought to intervene as a plaintiff, the City of New York was the "authorized agent" of injury and one of the parties against which coercive relief was sought; for these reasons, the Court noted, it had been named as a defendant. *Id.* The Court found this relevant because, unlike with Philadelphia's proposed intervention as a plaintiff seeking relief against a state, the presence of New York in the case created "no problems under the Eleventh Amendment." *Id.* In addition, whereas Philadelphia was situated similarly to numerous other downstream users, both political subdivisions and private entities, the City of New York stood alone with the State of New York as being named by the plaintiff as the instrument of injury—*i.e.*, as an entity that "was planning the actual diversion of the water for its use." *Id.* at 370-71.

On other occasions the Court has allowed non-state entities such as municipalities to be named as defendants in water disputes between two states where the municipality or other non-state entity was accused of being the agent of injury or executing the policy to which the complaining state objected. For example, the Court allowed an action by the State of Missouri against the State of Illinois and the Sanitary District of Chicago to enjoin the latter's discharge of sewage into the Chicago River and from there to the Mississippi River. *Missouri* v. *Illinois*, 180 U.S. 208, 242 (1901). The Court found that it was proper for Missouri to name as defendants both the Sanitary District and the State of Illinois, because the Sanitary District was acting pursuant to state authority as "an agency of the state to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended." *Id.* The Court allowed the State of Arizona to file an action to resolve rights to the Colorado River, naming as de-

fendants the State of California and seven of its public agencies, which were accused of improperly diverting water from the river. *Arizona* v. *California*, 373 U.S. 546, 551 (1963); *see also Arizona* v. *California*, No. 8, Orig. (U.S.), Bill of Complaint, pp. 16-19 (1952). In a case primarily brought against the State of Colorado, the Court allowed the State of Kansas to name as defendants "a number of corporations, who were charged to be engaged in depleting the flow of water in the Arkansas river." *Kansas* v. *Colorado*, 206 U.S. 46, 49 (1907). In another case by Colorado against Kansas to settle rights to the Arkansas River, the Court allowed Colorado to name as a defendant the Finney County Water Users' Association, a Kansas organization. *Colorado* v. *Kansas*, 320 U.S. 383 (1943). The Court ultimately granted Colorado's request for an order enjoining Finney from prosecuting certain pending actions against Colorado water users. *Id.* at 388-91. And in *New York* v. *New Jersey*, 256 U.S. 296, 302 (1921), the Court allowed an action by the State of New York against the State of New Jersey and the Passaic Valley Sewerage Commissioners, seeking an injunction against the discharge of sewage into Upper New York Bay—a discharge that, according to New York, was being carried out by the Sewerage Commission. In some of these cases, the question arose whether the defending *state* was a proper party (and thus whether the action was properly brought within the Court's original jurisdiction) because the alleged harm was being carried out by the state agency, not the state itself. *See, e.g., id.* at 302; *Missouri* v. *Illinois*, 180 U.S. at 242. But there was no suggestion that the state agency was not properly named where the agency was alleged to be the agent or instrumentality of the harm to the complaining state.

To be sure, the cases discussed in the foregoing paragraph involved situations in which the non-state entities were named as defendants by the complaining state, and thus did not voluntarily seek the Court's permission to intervene. The Court made this point in *New Jersey* v. *New York*, noting that the City of New York, unlike the City of Philadelphia, had been "forcibly joined" in the action. 345 U.S. at 375. But the cases also clearly illustrate the Court's consistent practice of permitting defendant status for non-state entities that have a legitimate and logical place in the controversy, including as the agent or instrumentality of the wrongdoing alleged by the complaining state. Both types of cases—those in which a non-state entity is named as a defendant as an original matter, and those, such as the present case, in which such an entity seeks to intervene as a defendant—implicate concerns over the purposes of the Court's original jurisdiction, and the need correspondingly to limit the parties that may participate in original actions. But in both types of cases, the Court's precedents would appear to allow non-state entities to become defendants in appropriate circumstances. Such circumstances include, as the above cases show, those in which the non-state entity is the "authorized agent" for a transfer or diversion of water challenged by the complaining state. *See, e.g., id.* at 375.

There also is not a compelling logical distinction between original jurisdiction cases in which the complaining state names an entity as a defendant, and those in which a party seeks to intervene as a defendant. The maxim that the plaintiff is the "master of its complaint" has less force in original jurisdiction cases, because it is the Court—and not the complaining state—that ultimately decides whether

and in what form the Court's original jurisdiction will be exercised. Even in cases between states, the Court may limit its original jurisdiction or decline to exercise such jurisdiction altogether. *See, e.g.*, *Mississippi* v. *Louisiana*, 506 U.S. 73, 76-77 (1992); *Wyoming* v. *Oklahoma*, 502 U.S. 437, 450 (1992). *See also* V.L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185 (1993). If a case does not "sufficiently implicate the unique concerns of federalism" underlying the grant of original jurisdiction, *Maryland* v. *Louisiana*, 451 U.S. 725, 743 (1981), the Court may deny leave to file a bill of complaint. A state seeking to initiate litigation in the Court may not simply file a complaint, but must file a motion seeking leave under the Court's Rule 17, which allows a complaint only in "appropriate cases." *Wyoming* v. *Oklahoma*, 502 U.S. at 451. Among the factors the Court considers is "the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim." *Mississippi* v. *Louisiana*, 506 U.S. at 77 (citations omitted).

Consistent with these principles, the Court also has power to control the parties to an original action. If the plaintiff state seeks leave to file a complaint that unnecessarily names non-state parties, the Court may either deny the request or dismiss the non-state parties. For example, the Court has dismissed non-state parties named as defendants by the complaining state where the Court found that their interests would be represented sufficiently by the defendant state. In *Kentucky* v. *Indiana*, the Court made clear that party states are deemed to represent the interests of all of their citizens unless "relief is properly sought as against" the individual citizen. 281 U.S.

163, 173 (1930). That case involved an interstate compact between the party states to build a bridge across the Ohio River. Indiana citizens sued in state court to enjoin the construction of the bridge, and the resulting delay caused Indiana to breach the compact. Kentucky sought leave to file a bill of complaint against (1) Indiana, to compel specific performance of the contract and (2) the private plaintiffs in the state court action, to enjoin prosecution of that action. The Court granted leave to file the complaint, but later dismissed it as to the individual defendants, holding that they had no "interest whatever with respect to the contract and its performance other than that of the citizens and taxpayers, generally, of Indiana, an interest which that state in this suit fully represents." *Id.* at 174.

In *Kentucky* v. *Indiana*, the Court expressly noted that "[a]n individual citizen may be made a party where relief is properly sought as against him, and in such case he should have suitable opportunity to show the nature of his interest and why the relief asked against him individually should not be granted." 281 U.S. at 173-74. But where the relief sought is "merely incidental to the complete relief to which the complainant would be entitled if it should prevail as against the defendant state"—such as the injunction against the prosecution of the individual defendants' state court suit—the individual defendant has "no standing to litigate on his own behalf the merits of a controversy which, properly viewed, lies solely between the states." *Id.* at 174. In other words, consistent with *New Jersey* v. *New York*, *Missouri* v. *Illinois*, *Arizona* v. *California*, and *Colorado* v. *Kansas*, one circumstance in which a citizen of a party state may properly become a party in an original action is where non-incidental relief is

sought against it by the plaintiff. *Cf. Texas* v. *New Jersey*, 379 U.S. 674 (1965) (private company allowed as a party in original jurisdiction action concerning which state could take title to property deemed abandoned by the company).

The Court also has allowed non-state entities to be parties to original actions where they have a "direct stake" in the action, although there is little precedent for what type of "direct stake" will suffice. In *Maryland* v. *Louisiana*, eight states filed an original action against the State of Louisiana, challenging a tax it was imposing on natural gas brought into the state. 451 U.S. at 734. The Court allowed intervention by 17 natural gas pipeline companies, which the Court found had a "direct stake in this controversy" because the tax fell on such entities as owners of the gas; the Court also noted that participation by the pipeline companies would assist in "a full exposition of the issues" and that it is "not unusual to permit intervention of private parties in original actions." *Id.* at 745 n.21. Thus, the Court allowed intervention even though the states challenging the tax could have been deemed to represent the pipelines' interests. The deciding factor appeared to be that the effect of the tax fell directly on the pipelines, making their interest more compelling than that of an average citizen of an affected state and making their expertise and knowledge valuable to a "full exposition" of the issues. *Id.*

In another case, *Texas* v. *Louisiana*, the Court allowed intervention by a non-state party whose property interests were at stake. That case involved boundary disputes between and among Texas, Louisiana and the United States, including a dispute over the lateral seaward boundary between Texas

and the United States extending into the Gulf of Mexico. 426 U.S. 465, 466 (1976). In connection with that issue, the United States claimed title to islands in the Sabine River. *Id.* The City of Port Arthur, Texas filed a motion to intervene, and the Court granted the motion. *Texas* v. *Louisiana*, 416 U.S. 965 (1974). The Court later explained that Port Arthur "was permitted to intervene for the purposes of protecting its interests in the island claims of the United States." 426 U.S. at 466. In *Utah* v. *United States*, 394 U.S. 89 (1969), the Court addressed a dispute between the State of Utah and the United States over title to the Great Salt Lake, including lands that had been exposed and rendered usable due to the shrinkage of the lake over the years. Morton International, Inc., a private company, sought to intervene in order to quiet its title to certain of the lands at issue. The Court noted that, if Utah had sought to rely upon Morton's title to the lands to defeat the claims of the United States, the motion "would have had a substantial basis," because "if Utah sought to invoke Morton's title to avoid payment to the United States, it would seem fairest to permit Morton to speak for itself." *Id.* at 92. Although the Court ultimately denied the motion because a stipulation between the United States and Utah had rendered the issue of Morton's title irrelevant, the Court's analysis suggests that if one of the state parties would rely substantially upon the ownership interests of a private party, fairness may dictate allowing that party to join the action. *Id.* at 92-93.

From these authorities may be distilled the following rule that governs the motions here: Although the Court's original jurisdiction presumptively is reserved for disputes between sovereign states over sovereign matters, non-state entities may become

parties to such original disputes in appropriate and compelling circumstances, such as where the non-state entity is the instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief, where the non-state entity has an independent property interest that is directly implicated by the original dispute or is a substantial factor in the dispute, where the non-state entity otherwise has a "direct stake" in the outcome of the action within the meaning of the Court's cases discussed above, or where, together with one or more of the above circumstances, the presence of the non-state entity would advance the "full exposition" of the issues.

VI.

The City of Charlotte is the largest municipality and provider of water supply and wastewater treatment services in the Catawba River Basin. Charlotte is the entity in North Carolina vested with authority to carry out the large majority of the inter-basin transfers of which South Carolina complains. In the Complaint, South Carolina objects to three specific inter-basin authorizations for the transfer of water from the Catawba River—those granted to Charlotte-Mecklenburg Utilities, Concord and Kannapolis, and Union County—complaining that these transfers improperly reduce the flow of water into South Carolina. Such transfers, South Carolina says, exacerbate existing natural flow and drought conditions that contribute to low flow in the Catawba, thereby causing harm to South Carolina. As to the Charlotte transfer in particular, South Carolina states:

> In March 2002, the [North Carolina Environmental Management Commission] granted the application by the Charlotte Mecklenburg Utili-

> ties to transfer up to 33 million gallons per day from the Catawba River Basin to the Rocky River Basin, more than double the 16 million gallons per day limit that had previously applied. This permit, moreover, was granted in the midst of the severe drought affecting the Catawba River from 1998 through 2002, and these inequitable withdrawals of water from the Catawba River necessarily exacerbated the harms that drought was imposing on South Carolina and its citizens.

Complaint ¶ 20(a).

As noted above and discussed in more detail in the September 14, 2008 order regarding the scope of the action, the focus of South Carolina's Complaint is the North Carolina inter-basin transfer statute and a small number of authorizations granted under that statute for transfers of water from the Catawba—including the permit held by Charlotte. In this respect, Charlotte's claimed interest is not just that of a user of water—a type of interest that the Court generally has not considered sufficiently "compelling" to justify intervention. *See New Jersey* v. *New York*, 345 U.S. at 373. Rather, Charlotte—which, like the City of New York in *New Jersey* v. *New York*, is the entity effectuating the "actual diversion of the water for its use," 345 U.S. at 370-71—is the "authorized agent" of a large part of South Carolina's claimed injury. *Id.* at 375. An injunction invalidating all or a portion of North Carolina's inter-basin transfer statute or the permits granted thereunder would affect Charlotte directly, such that it should be permitted to defend itself. *Utah* v. *United States*, 394 U.S. at 92. Even though Charlotte has not been named by South Carolina as a defendant, for practical purposes non-incidental relief is sought

against it, and it "should have suitable opportunity to show the nature of [its] interest and why the relief against [it] individually should not be granted." *Kentucky* v. *Indiana*, 281 U.S. at 173-74.

That North Carolina already is a party to this action should not foreclose intervention by Charlotte. In *New Jersey* v. *New York*, the Court stated that intervention may be allowed where the compelling interest shown by the proposed intervenor is "not properly represented by the state." 345 U.S. at 373. Although the Court did not elaborate on this standard, there is no indication the Court intended this to mean that there must be a conflict of interest or some other disabling factor that would prevent the party state from representing the proposed intervenor's interests. As noted above, the Court has allowed municipalities and other entities to participate as defendants in original actions where their interests are directly challenged, such as where the complaining state challenges a diversion of water to that municipality. It has done so even where the state in which the municipality was located was a party to the action and had interests aligned with those of the municipality. *See, e.g.*, *New Jersey* v. *New York*, 345 U.S. at 375; *Missouri* v. *Illinois*, 180 U.S. at 242; *Kansas* v. *Colorado*, 206 U.S. at 49.

In the context of motions to intervene, the Court has allowed intervention where a concrete property right or other interest of the intervenor was at issue, even where it appeared that one of the party states would assert that same interest in support of its claim or defense. As discussed above, the Court allowed Port Arthur, Texas to intervene in a case involving a boundary dispute among Texas, Louisiana and the United States. *Texas* v. *Louisiana*, 416 U.S.

965. Boundary disputes between states, like other original actions, implicate core sovereign interests. Although Texas presumably could have represented Port Arthur's interests, the Court allowed Port Arthur to intervene for the "purposes of protecting its interests in [certain real property]." *Texas* v. *Louisiana*, 426 U.S. at 466. *See also Maryland* v. *Louisiana*, 451 U.S. at 745 n.21 (allowing intervention by oil companies, even though the complaining states would have advanced the same interests as the intervenors); *Utah* v. *United States*, 394 U.S. at 92 (noting that intervention motion by private company would have "substantial basis" if the responding state would rely upon that company's title to defeat claims of the United States). Under these precedents, the fact that North Carolina's interests may be similar to Charlottes' does not preclude it from appearing and defending its transfer permit. *See Kentucky* v. *Indiana*, 281 U.S. at 173-74.

South Carolina objects that the Court never has permitted a private person or non-sovereign entity, including a municipality, to intervene in an original equitable apportionment action. But this frames the issue too narrowly: There is no special rule applicable only to equitable apportionment cases that precludes intervention by non-sovereigns. To the contrary, original jurisdiction actions by definition implicate sovereign interests, and the Court's precedents firmly establish that non-state entities may participate in original actions in appropriate circumstances. As noted above, the Court has allowed non-sovereigns to intervene in other types of original actions. *See Texas* v. *Louisiana*, 426 U.S. at 466; *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922); *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21. The Court has allowed intervention in water disputes between states,

albeit by third-party states or other sovereigns. *See Arizona* v. *California*, 460 U.S. 605, 614-15 (1983) (allowing Indian tribes to intervene); *New Jersey* v. *New York*, 280 U.S. 528 (1930) (allowing state to intervene). The Court has allowed plaintiff states to join non-sovereigns in original actions involving water disputes between states. *See New Jersey* v. *New York*, 283 U.S. 336 (1931); *Missouri* v. *Illinois*, 180 U.S. at 242; *Arizona* v. *California*, 373 U.S. at 551. The Court also has recognized that there are situations where the intervention of a citizen of a party state in an equitable apportionment action may be appropriate. *See New Jersey* v. *New York*, 345 U.S. at 373.

Charlotte's entitlement to intervene thus should not turn on whether a municipality previously has been allowed to intervene in this particular type of original action. For the reasons set out above, Charlotte has presented an interest sufficiently compelling and concrete to warrant intervention for the limited purpose of protecting its interest in defending the current inter-basin transfer regime, and its own permit in particular. *See Kentucky* v. *Indiana*, 281 U.S. at 174. Because Charlotte's right to intervene turns on its status as one of the recipients of the three interbasin transfers that South Carolina identifies in its Complaint, there is a practical limitation on the number of similarly situated entities that would be entitled to be made parties. *New Jersey* v. *New York*, 345 U.S. at 373.

VII.

CRWSP's motion to intervene is similar analytically to Charolotte's. CRWSP describes itself as a joint venture of units of government of North Carolina and South Carolina. The two participants in the

joint venture are Lancaster County Water and Sewer District ("Lancaster") and Union County. Lancaster is a special purpose district organized under the laws of South Carolina to furnish retail water and sewer services within Lancaster County, South Carolina. Union County is a North Carolina county that supplies water and sewer services within its borders. Union County is authorized under the North Carolina inter-basin transfer statute to transfer up to 5 million gallons per day from the Catawba River Basin.

Under the joint venture arrangement, Union County and Lancaster jointly own a water plant, site piping, and other real and personal property of CRWSP. The CRWSP plant is located in Lancaster County, South Carolina, which is where all of CRWSP's intake from the Catawba River occurs, including the water that Union County withdraws under North Carolina law. In total, CRWSP may draw 36 million gallons of water per day from the Catawba, and 5 of these 36 million gallons represent the Union County transfer about which South Carolina complains.

South Carolina argues that CRWSP is not a proper party because it is a mere user of water, and the purpose of an equitable apportionment action is to decide the rights of the party states as between each other and not among individual users. CRWSP is seeking to intervene not as a mere user of water, however, but as an entity carrying out the "actual diversion of water" that has been challenged by the plaintiff state. *New Jersey* v. *New York*, 345 U.S. at 375. CRWSP is in a position similar to Charlotte and the City of New York in *New Jersey* v. *New York*. Although CRWSP's entitlement under North Carolina law is smaller

than Charlotte's, it is one of the three transfers targeted by South Carolina in the Complaint. Like Charlotte, CRWSP is the "authorized agent for the execution of the sovereign policy which threaten[s] injury to the citizens of [South Carolina]." *Id.* at 375.

CRWSP asserts that neither North Carolina nor South Carolina can represent its interests fully because its corporate structure combines entities of both States. It contends that it is not fully a citizen of either State and that both States treat it as an independent and competitive third-party user of the Catawba River. This argument is not compelling, standing alone, as a basis for intervention. If CRWSP were an ordinary user of water—and not an "authorized agent" of injury with a direct stake in defending its North Carolina authorized transfer—the fact that its participants are citizens of both of the competing party states likely would not provide it with a sufficiently compelling basis to intervene in an original action. As South Carolina argues, municipalities cannot combine to form a sovereign. Rather, municipalities are creatures of state law, and any rights they enjoy "can rise no higher than those of [the party state.]" *Nebraska* v. *Wyoming*, 295 U.S. 40, 43 (1935).

Although CRWSP's dual citizenship status does not provide an independent basis for intervention, CRWSP, like Charlotte, has a "compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest in not properly represented by the state." *New Jersey* v. *New York*, 345 U.S. at 373-74. For the same reasons as with Charlotte, CRWSP should be allowed to appear separately in order to defend its transfer, which is the subject of South Caro-

lina's claim for relief. CRWSP has a compelling interest in defending its ability to execute the transfer challenged by South Carolina and should be allowed to intervene for that limited purpose.

VIII.

Duke Energy is positioned differently from Charlotte and CRWSP. Duke is not the immediate target of a request by South Carolina for injunctive relief, and thus does not fall squarely within the cases in which a non-state entity was the "authorized agent" of injury to the complaining state was made a party. Nonetheless, for several reasons, Duke has several strong and independent interests that could affect, or be affected by, the outcome of this proceeding.

First, the outcome of any equitable apportionment of the Catawba will be affected by Duke's extensive development of the river over the course of the last century—and those operations in turn would be affected by any decree in this action. Since the early 20th century, both before and pursuant to its 1958 FPC license, Duke has operated reservoirs along the Catawba in North and South Carolina that allow it to generate hydroelectric power and supply cooling water for its nuclear power and coal-fired plants in the Catawba River basin. This system of waterworks has altered the Catawba from what would have been its natural flow absent such works. Duke asserts—and South Carolina does not dispute—that Duke's hydroelectric plants effectively control the flow of the Catawba through the impounding of water in reservoirs and the release of that impounded water. Any attempt to quantify the water that naturally would be available to South Carolina absent the complained-of transfers in North Carolina will require an analysis of Duke's operations and the flows that it is

required to maintain from its reservoirs into South Carolina. In addition, the "existing economies" created by Duke's operations—most notably businesses and communities dependent upon its facilities and operations, and others that depend upon Duke's extensive use of the Catawba for hydroelectric purposes—likely will be an important consideration. *See Colorado* v. *New Mexico*, 459 U.S. 176, 187 (1982). And because Duke controls the flow of the Catawba River—and in particular the outflow at Lake Wylie through which the Catawba flows into South Carolina—any Court-ordered alteration of the flow would be carried out by Duke and would directly affect its operations.

Second, and relatedly, the terms of Duke's existing and prospective licenses, as well as the negotiated terms agreed upon by relevant stakeholders through the CRA, are relevant to the proceedings here. Both Duke's existing 1958 FPC license and the agreed-to terms for its prospective FERC license set minimum flow requirements under various conditions, including times of drought. Duke's existing FPC license requires it to release specified amounts of impounded water at locations in North and South Carolina, in consultation with state agencies. Most notably, Duke's reservoir at Lake Wylie, which straddles the border between the States, is the immediate source of water from the Catawba flowing into South Carolina, and Duke's existing FPC license requires Duke to maintain a minimum average daily flow of 411 cubic feet per second into South Carolina from the Wylie dam. The CRA submitted with Duke's application for a new license requires increased flow rates during periods of normal rainfall and drought periods. It also sets a Low Inflow Protocol requiring conservation measures that become more stringent as low

flow conditions increase. Duke contends with some force that if a new license is granted, the issues of equitable apportionment raised by this action will have to be addressed in the context of the new minimum daily flow and other requirements. In addition, although the findings and recommendations in the CRA are not binding here, many of the same factors addressed in the agreement—such as natural flow, existing uses, and effect of drought conditions—would be considered in an apportionment inquiry. Duke correctly notes that it will provide a direct link to the CRA negotiations process and the FERC proceedings that will foster "a full exposition of the issues." *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21.

Even more significantly, there is a strong possibility that the terms agreed to by the relevant stakeholders in the CRA will be directly at issue in this litigation, thus triggering Duke's direct interest in preserving that agreement and its existing and prospective licenses. The terms of the CRA are central to the defenses asserted by North Carolina, which contends, in essence, that the CRA provides South Carolina with more than enough water to meet its needs, thus obviating this proceeding. Although South Carolina has equivocated on whether it intends to challenge the CRA in the action—for example, South Carolina claims that the CRA establishes a relevant benchmark for its entitlement to water from the Catawba, and cites data developed during the CRA negotiations, but at the same time appears to claim that the scientific models and assumptions underlying the CRA are subject to challenge or at least questionable—it seems clear that the terms memorialized in the CRA and mandated by any ensuing Duke license will be challenged, or relied upon, by one or both parties in this action. *Cf. Utah*

v. *United States*, 394 U.S. at 92. If the scientific data and conclusions that support the CRA, which in turn is the principal support for Duke's license application, will be placed in issue, it would seem fair and equitable to allow Duke to defend those data and conclusions, as well as the CRA and license application themselves. For this reason alone, Duke has a strong and direct stake in the outcome of this proceeding. *See Maryland* v. *Louisiana*, 451 U.S. at 745 n.21.

Third, at a minimum, the Court in this action would likely consider the *process* that Duke orchestrated as part of its relicensing application, namely the multi-stakeholder negotiation that resulted in the CRA. That process involved the participation and approval of multiple entities, including state natural resources departments, other state agencies, public water suppliers, local governments, and interest groups, among others, and produced detailed analyses and studies of the historical flow of the Catawba—both with and, hypothetically, without Duke's operations—as well as the historical, present, and projected uses of the river. South Carolina itself cites these studies in its Complaint, as does North Carolina in its Answer. *See* Complaint ¶ 16; Answer ¶ 16. The agreement among relevant stakeholders—including South Carolina's Department of Natural Resources—almost certainly will be considered in any equitable apportionment analysis, which would look to existing uses and needs of those affected by the flow of the river, including the stakeholders that joined the CRA.[1]

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[1] In addition to its arguments discussed in the text, Duke asserts that it is charged with protecting public interests recognized by federal law and protected by Duke's license under the Federal Power Act citing various statutory provisions that

In sum, the outcome of this action will affect Duke directly because Duke has significant control over the flow of the Catawba River, will be affected directly by any change in flow, and may have to alter its practices and the CRA if the assumptions underlying that agreement are altered through this litigation. Its interests are at least as compelling, if not more so, than the 17 pipelines companies that were allowed to intervene in *Maryland* v. *Louisiana*, *supra*.

IX.

In its motion for clarification or reconsideration of the May 27, 2008 order granting intervention, South Carolina offers several reasons why that order should be limited or changed. In a telephonic hearing held on July 17, 2008, the Special Master indicated that the motion would be denied. Following South Carolina's subsequent request that the intervention issue be addressed in an Interim Report—a request that was granted after briefing from the parties—the Special Master indicated that both the original reasons for the May 27, 2008 order and the reasons for the denial of the motion for clarification or reconsideration would be set forth in the Interim Report.

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govern FERC's own duties and the requirements for licenses issued by FERC. *See, e.g.*, 16 U.S.C. § 797(e) (FERC must take into account certain considerations in issuing licenses); 16 U.S.C. § 803(a)(1) (setting forth conditions for licenses). But none of the provisions and regulations cited by Duke states that Duke itself must determine and act upon the public interest, except indirectly by complying with the terms and conditions of its license as established by FERC through its own public interest obligations under the governing statutes and regulations. Accordingly, this "public interest" theory is not a factor in the analysis reflected in this Interim Report.

South Carolina's request for "clarification" turns on an artificially narrow construction of the May 27, 2008 order. At various points in the order (and in the analysis above), the Special Master stated that the Intervenors had an interest in the *outcome* of this action, or in the relief sought. South Carolina reads these references to say that the Intervenors' interests are limited to the *relief* that might be awarded in connection with any equitable apportionment. Under this reading, the Intervenors would have no interest in what the parties have called "Phase One" of the action, variously (and sometimes inconsistently) defined by the parties as being limited to the harms suffered by South Carolina, and/or the uses in North Carolina that have caused or contributed to those harms. South Carolina seeks to "clarify" that any participation by the Intervenors must be limited to the remedial phase ("Phase Two") and that they may not participate in what might be called the liability phase ("Phase One").

South Carolina's argument misperceives the basis for the May 27, 2008 order. The order did indicate that each of the Intervenors has an interest in the outcome of this action—that is, in preventing one or both of the state parties from obtaining the relief that they seek. In the case of Charlotte and CRWSP, the interest is in preventing a disposition inconsistent with the existing authorizations for interbasin transfers challenged in South Carolina's Complaint, including its request for injunctive relief. In the case of Duke, the interest is in preserving existing operations and the negotiated outcome set out in the CRA and in Duke's pending license application, to the extent that either state might seek an outcome contrary to the existing or agreed-to *status quo*. Although either or both of these interests may be identified by

reference to a preferred outcome of the action, that does not mean that the only interest that the Intervenors have is in the remedial phase. Rather, as with any litigant, they have an interest in the liability proceedings that could lead to the adverse result—including, for example, the question whether South Carolina has suffered harm as a result of particular interbasin transfers within the State of North Carolina (a "Phase One" question). To put the matter another way, the fact that it is the ultimate relief sought that may adversely affect the Intervenors does not logically or legally mean that their interests are limited to the remedial phase.

The May 27, 2008 order did indicate that the motions to intervene would be granted only for limited purposes. This was based upon the simple principle, conceded by the Intervenors, that an intervenor's participation in an original case should be directed toward protecting that intervenor's interests and not as a means to litigate all aspects of the dispute, even those that do not affect the intervenor. *See, e.g., Kentucky* v. *Indiana*, 281 U.S. at 173-74; *Utah* v. *United States*, 394 U.S. at 92. As the Special Master indicated at the July 17, 2008 hearing, particular issues or objections relating to participation by Intervenors may be addressed as part of the case management process.

That said, the limitation that South Carolina proposes—participation by Intervenors only in Phase Two—does not make practical sense in light of the nature of the Intervenors' interests and the manner in which discovery is proceeding. South Carolina appears to concede that Phase One would involve not only issues of harm to South Carolina, but also the uses and activities in and by North Carolina that al-

legedly are causing that harm. The Intervenors have an interest in addressing these Phase One issues, including the existence or nonexistence of harm to South Carolina from the Intervenors' own activities.

South Carolina asserts that it is not the specific uses of water in North Carolina that must be addressed in Phase One, but rather the cumulative uses in North Carolina that produce an alleged reduction in flow into South Carolina. Under this theory, any decree by the Court would simply limit North Carolina to a fixed amount of water that North Carolina could allocate to uses within the state—thus rendering irrelevant any consideration of particular existing uses by the Intervenors or other users. South Carolina cites no precedent supporting such a narrow conception of the apportionment inquiry—one that seems at odds with this Court's practice of engaging in a detailed consideration of existing uses and other conditions as part of an equitable apportionment analysis. Whatever parameters ultimately will define the various "Phases" of this action—a matter that currently is being addressed through the discovery and case management processes—it seems unlikely that the sole consideration for "Phase One" will be whether South Carolina has suffered a cumulative reduction in flow from the Catawba. Indeed, as a practical matter, the parties already have agreed that certain discovery may cover both Phase One and Phase Two in order to avoid duplication, thus complicating any proposed effort to limit participation to one Phase or the other.

For these reasons, South Carolina's request for "clarification" of the May 27, 2008 order is not well taken.

X.

South Carolina also requested that the Special Master reconsider the merits of the May 27, 2008 order. This request was made before South Carolina asked the Special Master to issue an Interim Report on the subject of intervention. For the reasons that follow, South Carolina's arguments do not provide a basis for denying intervention.

South Carolina's principal argument with respect to the two municipal entities, Charlotte and CRWSP, is that the May 27, 2008 order placed too much emphasis on the authorizations held by these entities to transfer water from the Catawba River Basin under North Carolina's interbasin transfer statute. This argument takes several forms, none of which would appear to change the result reached in the May 27, 2008 order.

First, South Carolina argues that the authorizations held by these entities cannot justify intervention because they are created solely by state law, and this Court has made clear that federal common law—not state law—governs the equitable apportionment analysis. *See Illinois* v. *Milwaukee*, 406 U.S. 91, 103, 105 & n.7 (1972); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). According to South Carolina, state law permits and other authorizations are irrelevant because they would be overridden by whatever apportionment the Court makes as a matter of federal common law. This argument does not accurately state the role of state law in the equitable apportionment analysis. Although federal common law ultimately controls any equitable apportionment by this Court, state law is not irrelevant. Indeed, in some cases, the Court has looked to state law as the federal common law rule in

the case—as, for example, where both states recognize the same state law water rights rules and the Court determines that following those rules is the most fair and equitable course. This has occurred with some regularity, for example, in cases where both states parties follow the rule of prior appropriation. *See, e.g.*, *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945); *Colorado* v. *New Mexico*, 459 U.S. 176, 183 (1982); *Wyoming* v. *Colorado*, 259 U.S. 419, 470 (1922). State law also plays an indirect role where state law rights or other interests or uses are considered as part of the equitable apportionment analysis. *See Connecticut* v. *Massachusetts*, 282 U.S. 660, 670-71 (1931) (equitable apportionment analysis depends "upon a consideration of the pertinent laws of the contending States and all other relevant facts"). The Court consistently has held that state law, and water uses authorized by state law, are to be considered and weighed as the circumstances require.

Here, it is likely that state-created rights and interests, including the authorizations held by Charlotte and CRWSP to transfer water from the Catawba River Basin for use by their customers and citizens, will be considered in any equitable apportionment of the Catawba. For example, "the extent of established uses" and "the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former" are among the factors the Court has considered. *Nebraska* v. *Wyoming*, 325 U.S. at 618. The Court also would take into account the degree to which users and customers have come to rely upon those state law transfer rights. In light of the Court's consistent practice of considering state law interests and uses as part of an equitable apportionment analysis, South Carolina's

assertion that such interests are irrelevant seems overstated.

South Carolina next asserts that the May 27, 2008 order inappropriately cast South Carolina's case as being focused on interbasin transfers, when in fact such transfers were only "mentioned" as part of a broader equitable apportionment analysis looking to the cumulative effect of all North Carolina uses of the Catawba River. This broader approach, South Carolina argues, sets this action apart from the cases cited above in which a municipality was named as a defendant because it was the instrumentality of the complained-of injury. But a fair reading of South Carolina's Complaint and other papers, including its preliminary injunction motion, shows that interbasin transfers are not merely "mentioned," but are the primary if not exclusive means by which South Carolina claims to have been harmed. The focus on transfers is so pervasive that North Carolina—with substantial justification—tried to limit the action and any ensuing discovery to the question of interbasin transfers. Although the Special Master concluded that such a limitation was not warranted at this stage, that decision was based upon South Carolina's prayer for relief, the corresponding breadth of permissible discovery, and the preliminary stage of the proceedings. The decision did not conclude that interbasin transfers are not central to the Complaint (they are) or that South Carolina did not seek to enjoin the transfers to these municipalities authorized by North Carolina (it does).

South Carolina next repeats its argument that this Court's cases in which municipalities were named as defendants—cited in the May 27, 2008 order—are irrelevant because the non-state parties in those cases

were named as defendants by the complaining state, as opposed to being granted leave to intervene by the Court. South Carolina notes that this Court never has granted leave to a non-state entity to intervene in an equitable apportionment case—a point discussed in the May 27, 2008 order and again above. It is true that there is no direct precedent permitting intervention under the circumstances presented here, but nor is there direct precedent denying intervention. The closest case is *New Jersey* v. *New York*, in which the City of Philadelphia sought to intervene as a plaintiff in a long-pending action by the State of New Jersey against the City of New York and the State of New York. As discussed above, the other parties opposed the motion, in part because addition of Philadelphia as a plaintiff would violate the Eleventh Amendment. In denying the motion, the Court distinguished Philadelphia from the City of New York, which had been named by New Jersey as a defendant. 345 U.S. at 375. The Court noted that New York City "was forcibly joined as a defendant to the original action since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey," and went on to note that its presence as a defendant created "no problems under the Eleventh Amendment." *Id.* With the exception of being "forcibly joined," these same factors are present here with respect to Charlotte and CRWSP.

Finally, South Carolina argues that the interests of Charlotte and CRWSP can be represented by North Carolina, so that there is no need for them to intervene as parties. Although this argument draws upon the test for intervention articulated in *New Jersey* v. *New York*, 345 U.S. at 373, the fact remains that this Court has allowed intervention by non-state entities

in numerous cases where it was likely that one or more of the state parties would advance positions that would protect the non-state entity's interest. *See, e.g.*, *Texas* v. *Louisiana*, 426 U.S. at 466 (allowing Port Arthur, Texas to intervene in a case in which Texas was a party and presumably would have advanced the same interests); *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21 (permitting intervention by oil companies, even though the complaining states had the same interests). In these cases, the Court appears to have concluded that an entity whose concrete interests were directly at stake should have an opportunity to "speak for itself." *See Utah* v. *United States*, 394 U.S. at 92. And in the municipality cases discussed above, where the requested coercive relief would directly affect the municipality's interests, the Court allowed the municipality to be named as a party defendant even though its interests clearly were aligned with those of the defendant state or states. *See, e.g.*, *Missouri* v. *Illinois*, 180 U.S. at 242; *Arizona* v. *California*, 373 U.S. at 551; *New York* v. *New Jersey*, 256 U.S. at 302. All of these cases are consistent with the general rule that a non-state entity may properly be a party to an original action where it has a "direct stake" in the controversy. *See Maryland* v. *Louisiana*, 451 U.S. at 745 n.21. That rule applies to Charlotte and CRWSP, whose vested state interests are directly challenged by South Carolina's Complaint.

As for Duke Energy, South Carolina argues that the May 27, 2008 order was erroneous in several respects, but none of these arguments changes the conclusions reached in that order.

South Carolina first argues that Duke's interests are not threatened in this action because South

Carolina's Complaint seeks to *reduce* consumption by North Carolina—a result that would increase the water available to Duke for power generation. But, as Duke notes, Duke also has an interest in defending the flow requirements agreed to in the CRA against any demand by either party that would threaten or deviate from those requirements. South Carolina has not indicated clearly whether it is seeking an allocation that would be inconsistent with these flow requirements—*i.e.*, that would require a flow greater than that provided for by the CRA (or Duke's existing license). What the Complaint does clearly state is that the Catawba River is subject to reduced flow conditions, that these conditions are exacerbated by North Carolina's interbasin transfers, and that the Court should issue a decree granting South Carolina some unspecified apportionment of water from the river. As discussed above and in the May 27, 2008 order, it would be difficult if not impossible to analyze the request by South Carolina for a greater apportionment of water than it currently is receiving without reference to the flow requirements of the CRA, given that it is those flow requirements—and not solely the uses of water by North Carolina—that immediately govern how much water from the Catawba makes its way into South Carolina. At a minimum, the minimum flow requirements of the CRA are highly relevant to the question of actual or potential harm to South Carolina's interests.

South Carolina argues that reference to the CRA in this action would be improper because it would amount to "review" of a FERC order—a remedy that, by statute, must be sought exclusively in the Court of Appeals and not through an original proceeding in this Court. South Carolina does not refer to any authority for the proposition that mere consideration of

license requirements as part of an equitable apportionment analysis would constitute impermissible "review" of the administrative order granting the license. Duke's professed objective in this proceeding is to defend the CRA and any FPC or FERC license that it holds; if any other party, such as South Carolina, seeks to invalidate the license as part of an apportionment request, then the concern offered by South Carolina would be presented more directly. It seems unwise and unnecessary to prejudge at this stage the legal issues that would arise if the equitable allocation sought by either party would require invalidation of a license granted by FERC pursuant to its operative statute—issues that presumably would be the subject of legal briefing and might warrant soliciting the views of the United States. It suffices here to say that Duke has a strong interest in defending its license and the CRA that supports its pending license application.

Finally, it is noteworthy that South Carolina has identified no concrete prejudice from intervention by Duke. To the contrary, since the May 27, 2008 intervention order was issued, South Carolina has issued extensive discovery to Duke, including discovery seeking to test the scientific models used to support the flow requirements used in the CRA and in Duke's pending license application. Even if South Carolina had tried to "plead around" the CRA—which it did not—the issue has been squarely raised and presented by North Carolina, both on the issue of harm to South Carolina and in its affirmative defenses. The only apparent prejudice from Duke's participation would be a more zealous defense of the CRA than would be provided if intervention were denied. Again, if the CRA is to be placed in issue, Duke should be permitted to defend it.

XI.

For the reasons stated above, the Special Master recommends that the Court permit the interventions of Charlotte, CRWSP, and Duke Energy, and deny South Carolina's motion for clarification or reconsideration of the May 27, 2008 order.

Respectfully submitted,

KRISTIN LINSLEY MYLES
Special Master
560 Mission Street, 27th Floor
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November 25, 2008

No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,
v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To File Exceptions to First Interim Report of the Special Master

MOTION OF THE STATE OF SOUTH CAROLINA FOR LEAVE TO FILE EXCEPTIONS TO FIRST INTERIM REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE EXCEPTIONS

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December 9, 2008

IN THE

Supreme Court of the United States

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

MOTION OF THE STATE OF SOUTH CAROLINA FOR LEAVE TO FILE EXCEPTIONS TO FIRST INTERIM REPORT OF THE SPECIAL MASTER

The State of South Carolina, by its Attorney General, Henry Dargan McMaster, and pursuant to Rules 17 and 21 of the Supreme Court's Rules, moves this Court for leave to file Exceptions to the First Interim Report of the Special Master filed November 25, 2008, for the reasons stated in the accompanying brief in support. South Carolina also respectfully requests that the Court establish an expedited briefing schedule permitting a Court decision before the close of the October 2008 Term.

Respectfully submitted,

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4 Robert E. Beck et al., *Waters and Water Rights* (1991 ed., 2004 replace. vol.) 16

Josh Clemons, *Interstate Water Disputes: A Road Map for States*, 12 Southeastern Envtl. L.J. 115 (2004), *available at* http://www.olemiss.edu/orgs/SGLC/acf.htm 10

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Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743 (2000) 22

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BRIEF OF THE STATE OF SOUTH CAROLINA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE EXCEPTIONS TO FIRST INTERIM REPORT OF THE SPECIAL MASTER

South Carolina respectfully moves for leave to file exceptions to the First Interim Report of the Special Master ("Report"). The Report raises an issue of considerable and growing significance: under what circumstances (if any) may a non-state entity intervene in a dispute between two sovereign States over the equitable apportionment of an interstate river. In the Report, the Special Master erroneously recommends that the Court permit *three* such entities to intervene as defendants in South Carolina's suit against North Carolina: Duke Energy Carolinas, LLC ("Duke"), a for-profit commercial entity; the City of Charlotte, a political subdivision of North Carolina ("Charlotte"); and the Catawba River Water Supply Project ("CRWSP"), a cross-border joint venture between political subdivisions of North Carolina and South Carolina created for the purpose of diverting water from South Carolina to North Carolina. Unless rejected by this Court, the Special Master's recommendation will significantly increase the costs to South Carolina of this suit and greatly protract the Court's resolution of a suit with profound implications for water usage in North Carolina and South Carolina in a time of severe drought and water shortage.

In addition to the immediate consequences of this litigation, the Court should grant South Carolina's motion because the issue of appropriate standards for intervention under this Court's original jurisdiction is one of increasing importance. Similar interstate water controversies arise frequently before the

Court, including one case presently on the Court's original jurisdiction docket pending before a Special Master, and another in which a petition for a writ of certiorari is currently under review. This trend is likely to continue and — encouraged by the Special Master's recommendation in this case — individual water users and municipalities will likely seek to intervene to protect their particular uses.

Review of this issue is inevitable, and the interests of judicial efficiency and fairness to the party States favor the Court's immediate consideration. Pending this Court's review of proposed intervenors' status, the Special Master has made several discovery rulings permitting proposed intervenors to participate as parties with respect to document production. So as to lessen the recognized burden on South Carolina in having to litigate against four opponents, rather than one, the Special Master has declined to rule on intervention with regard to other aspects of discovery such as interrogatories, depositions, and expert reports pending this Court's review. Accordingly, as a practical matter, the case will not be able to proceed beyond document discovery until the question of proposed intervenors' status is resolved by this Court.

The legal issue presented is likewise important and ripe for decision now. This Court has never approved — but has often denied — intervention by non-state entities in an equitable apportionment case. As its precedent makes clear, such cases concern the apportionment of water *between and among* States, not how water is allocated *within* States among competing interests. Thus, the Court has declined to expand the narrow limits of its original jurisdiction with the explanation that, in matters of sovereign interest, the Court deems party States to represent all their citizens, both as a necessary recognition of sover-

eign dignity and as a working rule for good judicial administration.

The Report disregards the Court's well-settled principles by recommending that intervention by three non-state entities be permitted. The interests pressed by those putative intervenors, however, concern the allocation of water *within* the State of North Carolina — not the allocation of water *between* two States — and thus are precisely the sort of intramural water disputes that this Court has long held provide no basis for intervention in an original action. If allowed to stand, the Special Master's flawed recommendation would open the floodgates for numerous non-state entities to argue successfully for intervention in original actions.

Because the question of the appropriate legal standard for intervention in equitable apportionment actions is a recurring issue of exceptional importance to the management of this Court's original jurisdiction docket and is squarely presented by the Report, we ask the Court to (1) permit South Carolina to file exceptions to the Report, and (2) establish an expedited briefing schedule permitting a Court decision before the close of the October 2008 Term.[1]

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[1] In the alternative, the Court could deny the motions for intervention consistent with its controlling precedent. *See* South Carolina Br. in Opp. to Duke Energy Carolinas, LLC's Mot. for Leave To Intervene and File Answer (U.S. filed Dec. 11, 2007); South Carolina Br. in Opp. to Mot. of the Catawba River Water Supply Project for Leave To Intervene (U.S. filed Dec. 13, 2007); South Carolina Br. in Opp. to Mot. for Leave To Intervene of the City of Charlotte, North Carolina (U.S. filed Feb. 25, 2008).

STATEMENT OF THE CASE

The Catawba River flows from North Carolina to South Carolina and is subject to periods of inadequate flows, especially during times of drought. In recent years, these periods of inadequate flows have increased in both frequency and severity. At the same time, water use and population growth in North Carolina promise to expand dramatically, severely burdening an increasingly scarce resource. In this original action, South Carolina seeks an equitable apportionment of the Catawba River to ensure that, during times of low water flow, its citizens are not deprived of their equal rights in this interstate stream by North Carolina's consumptive uses of the river. South Carolina requests that the Court determine each State's equitable share of the river and enjoin North Carolina from consumptive uses of river water inconsistent with that apportionment.

Three non-state entities — Charlotte, CRWSP, and Duke — have each sought leave to intervene in this matter on the side of North Carolina. North Carolina has taken no position on the motions to intervene, but South Carolina has opposed their interventions. The Court referred the motions to intervene to the Special Master on January 15 (CRWSP and Duke) and February 13, 2008 (Charlotte).

On May 27, 2008, the Special Master issued a recommendation[2] that the Court grant each entity permission to intervene for the "limited purpose" of participating in arguments against any final decree

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[2] *See* Order Granting Motions for Leave to Intervene of the City of Charlotte, North Carolina, Catawba River Water Supply Project, and Duke Energy Carolinas, LLC (May 27, 2008) ("May 27, 2008 Recommendation"). Orders and pleadings filed by or with the Special Master are posted on the Special Master's website at http://www.mto.com/sm.

that would affect either their "unique interest" and "direct stake" in existing state authorizations to transfer water out of the Catawba River, or, in the case of Duke, its "unique and compelling interest" in its existing federal license and application for license renewal now pending before the Federal Energy Regulatory Commission ("FERC"). May 27, 2008 Recommendation at 8-12.

South Carolina understood the recommended grant of intervention for those "limited purposes" to mean that proposed intervenors could not participate as full parties in Phase One of the litigation, which the party States had agreed would be limited to determining whether South Carolina had sustained harm from North Carolina's consumptive uses and interbasin transfers of water from the Catawba River; Phase Two would address the balancing of factors under the Court's equitable apportionment precedent and, if appropriate, the fashioning of a decree equitably apportioning the river. In contrast, proposed intervenors expressed the view that they had full rights as parties to equal participation in all phases of the litigation, including propounding their own written discovery, participating in depositions, and filing their own expert reports. Accordingly, on June 27, 2008, South Carolina moved for clarification or, in the alternative, for reconsideration of the recommendation to grant intervention.[3]

The Special Master denied South Carolina's motion for clarification or reconsideration orally in a July 17, 2008 Telephonic Conference. South Carolina then requested that the Master's rulings be memorialized

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[3] *See* South Carolina Mot. for Clarification or, in the Alternative, for Reconsideration of the May 27, 2008 Order Granting Limited Intervention (June 27, 2008).

in an Interim Report for this Court's review. The Special Master ordered briefing on the issue of whether she should issue an Interim Report. Subsequently, the Special Master stated in an August 22, 2008 Telephonic Conference that she would issue an Interim Report.

In the meantime, to address proposed intervenors' role in discovery prior to this Court's review of their status, the Special Master made several rulings "pending the Special Master's issuance of an Interim Report regarding the issue of intervention and any proceedings in the Court with respect to such Interim Report." Case Management Order No. 7, ¶ 2 (Sept. 18, 2008) ("CMO No. 7"). Those rulings held that (a) document discovery may proceed "as though [proposed] [i]ntervenors were full parties";[4] (b) proposed intervenors may not propound interrogatories (or, as clarified subsequently, requests for admission); (c) "[d]eposition discovery shall be deferred pending final resolution of the intervention issue"; and (d) proposed intervenors may not serve third-party subpoenas. *Id.* ¶ 2(a)-(d). Accordingly, the case as a practical matter will not proceed into the deposition phase of discovery until this Court decides whether the proposed interventions should be granted or denied.

On November 25, 2008, the Special Master issued her First Interim Report, recommending that the Court grant the motions to intervene and deny South Carolina's request to clarify that proposed intervenors may participate, if at all, only in Phase Two of the litigation.

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[4] Proposed intervenors recognized that South Carolina had a right to obtain such documents through third-party subpoenas even if they were not permitted party status through intervention.

ARGUMENT

I. THE ISSUE BEFORE THE COURT IS ONE OF SUBSTANTIAL IMPORTANCE AND MERITS IMMEDIATE REVIEW

This Court has long held that, "[i]n original cases, . . . the [Special] [M]aster's recommendations are advisory only." *United States v. Raddatz*, 447 U.S. 667, 683 n.11 (1980); *see also Kimberly v. Arms*, 129 U.S. 512, 523-24 (1889) ("[t]he information which [the Special Master] may communicate . . . is merely advisory to the court, which it may accept and act upon, or disregard in whole or in part, according to its own judgment"); Robert L. Stern et al., *Supreme Court Practice* 577 (8th ed. 2002) ("[T]he Master's reports and recommendations are advisory only and are subject to exceptions and objections by the parties. The Court itself determines all critical motions and grants or denies the ultimate relief sought."). The Court thus plays a singular role in preventing unfair harm to one or more parties during the course of litigation. The Report's recommendation to permit intervention by three non-state actors would, if accepted, impose such harm by creating a substantial and immediate burden on South Carolina without appropriate legal or factual justification.

Now is the most effective time to review the Special Master's recommendation. The ordinary practice of Special Masters to submit an Interim Report upon referral of motions to intervene reflects the Court's interest in reviewing such motions *before* litigation continues for an extended time. *See, e.g., Guide for Special Masters in Original Cases Before the Supreme Court of the United States* 7-8 (Oct. Term 2004) (citing cases and specifically identifying motions to intervene as falling into a special category of motions

as to which the Court "want[s] the Master to file an Interim Report with a recommendation for disposition of the motion before going further").

Practical considerations fully justify adherence to the Court's typical practice here. Discovery and other proceedings before the Special Master are expected to go on for a period of years. Recognizing the irreparable injury South Carolina would suffer if proposed intervenors were permitted to participate as full parties before the Court resolves the intervention issues, the Special Master in CMO No. 7 stayed their participation — save for document discovery — pending this Court's review. Moreover, two of the proposed intervenors have stated (and the Special Master noted) that, if they are permitted to participate as full parties in all or part of the case, they will need additional time to conduct "catch-up" discovery. Sept. 26, 2008 Telephonic Conference Tr. at 12-13, 15-16. Accordingly, review is necessary and appropriate now to avoid further undue delay in proceeding to the deposition and trial phases of this case.

Discovery in this matter is in the early stages and will be extensive and costly to all involved. But South Carolina's burden will be substantially increased if the recommendation of the Special Master is adopted, due to increased litigation costs. Similarly, the costs incurred by the Special Master, which the parties must bear, will be likewise unnecessarily increased by proceeding with litigation involving intervention of three additional entities.[5]

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[5] The intervention-related costs incurred thus far have already been substantial. According to the Special Master, her office's fees through approximately November 2008 will likely be in excess of $118,000 for intervention-related issues and $60,000 for non-intervention-related issues. E-mail from Amy

It bears emphasis that South Carolina's financial burden resulting from intervention will be borne out of public funds, which are particularly constrained in the current economic climate.[6]

Notably, interstate water controversies similar to the one giving rise to this case persist between and among other States. The Court recently appointed

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Tovar to All Counsel (Oct. 30, 2008). If intervention is permitted, North Carolina and the proposed intervenors have already signaled that they will litigate to obtain a cost allocation whereby South Carolina would pay 50% of all costs in the litigation while North Carolina and the proposed intervenors would each pay only 12.5%, *see* North Carolina Letter Br. re Interim Allocation of Costs at 2 (Oct. 31, 2008), even though the presence of four entities on the defendants' side will greatly increase the overall costs of the litigation.

[6] In arguing that the Court should wait to review the intervention decisions until after discovery, trial, and the Special Master's issuance of a Final Report, CRWSP ignores the Court's usual practice of reviewing intervention decisions at the start, not the end, of the litigation (*see supra* pp. 7-8) and relies instead on inapposite cases that do not concern the Court's original jurisdiction. *See* CRWSP Letter Br. 2 (Dec. 8, 2008). CRWSP also argues that a denial of South Carolina's motion will not affect South Carolina because the discovery restrictions imposed on proposed intervenors relieve South Carolina of burdensome discovery obligations. *See id.* at 1-2. Yet it claims that, if the Court denies South Carolina's motion, "the discovery restrictions will be lifted and factual development will proceed," that is, proposed intervenors will seek to participate in depositions and submit multiple additional expert reports, thus increasing South Carolina's burden substantially. *Id.* at 3. That is precisely why, contrary to CRWSP's misreading of the Court's original jurisdiction jurisprudence, the remedy available to South Carolina subsequent to a Final Report is insufficient to ensure appropriate relief. The purpose of an Interim Report, and indeed the reason the Special Master has stayed full discovery pending the Court's review of the intervention issue, is to *prevent* harm to parties facing the discovery burdens of unlawful participation by proposed intervenors.

a Special Master in *Montana v. Wyoming/North Dakota*, No. 137, Orig., *see* 129 S. Ct. 480 (2008), which involves a claim for equitable apportionment of two area rivers. And Kansas again threatens to sue Nebraska for allegedly withdrawing too much water from the Republican River,[7] thereby violating a settlement among Colorado, Kansas, and Nebraska approved by this Court in 2003, following a lawsuit filed by Kansas in 1998. *See Kansas v. Nebraska*, 538 U.S. 720 (2003) (No. 126, Orig.). Additionally, Georgia has asked this Court to overturn a February 2008 ruling of the D.C. Circuit that the State needs congressional approval to use more water from Lake Lanier to supply the fast-growing Atlanta area. *See Southeastern Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008), *petition for cert. pending sub nom. Georgia v. Florida, et al.*, No. 08-199 (U.S. filed Aug. 13, 2008).

As competing demands for water in the United States grow with population, conflicts over the apportionment of water sources will increase, and the Court is thus likely to confront the same question raised here with some frequency.[8]

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[7] *See* Assoc. Press, *Kansas Threatens to Sue Nebraska Over Use of a River*, N.Y. Times, Dec. 20, 2007, at A29, *available at* http://www.nytimes.com/2007/12/20/us/20water.html.

[8] *See, e.g.*, Josh Clemons, *Interstate Water Disputes: A Road Map for States*, 12 Southeastern Envtl. L.J. 115, 115 (2004), *available at* http://www.olemiss.edu/orgs/SGLC/acf.htm; *cf. Hood ex rel. Mississippi v. City of Memphis*, 533 F. Supp. 2d 646, 651 (N.D. Miss. 2008) (dismissing for lack of jurisdiction a $1 billion lawsuit brought by Mississippi alleging that the City of Memphis, Tennessee, stole roughly 25 million gallons a day of Mississippi's water, and observing that the court "is not empowered to join Tennessee as a party to this action because original and exclusive jurisdiction of disputes between States

II. THE RECOMMENDATION THAT THREE NON-STATE ENTITIES BE ALLOWED TO INTERVENE IS INCONSISTENT WITH CONTROLLING PRECEDENT

The Special Master's recommendation that intervention be granted constitutes a sharp and unsupported departure from this Court's precedent. The recommendation should further be rejected because it relies on misapprehensions of South Carolina's Complaint.

A. The Report Departs From Court Precedent

This Court's precedent has consistently guarded the narrow confines of the Court's original jurisdiction granted by the Constitution. *See* U.S. Const. art. III, § 2, cl. 2 (permitting only those original actions involving "Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party"). This Court has repeatedly made clear that original actions are reserved for adjudication of disputes *between States* and not entities within those States. Thus, the Court has explained, "[w]e seek to exercise our original jurisdiction sparingly," and "individual users of water . . . ordinarily would have no right to intervene in an original action in this Court." *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam); *see also, e.g., New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam) ("Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions."). The Court has never permitted intervention by a private water user in an equitable apportionment action, though it has repeatedly denied such requests. *See*,

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resides with the United States Supreme Court"), *appeal pending*, No. 08-60152 (5th Cir. argued Dec. 3, 2008).

e.g., *Arizona v. California*, 514 U.S. 1081 (1995) (denying motion of West Bank Homeowners Association for leave to intervene); *Nebraska v. Wyoming*, 507 U.S. 584, 589-90 (1993) (noting that the Special Master recommended denial of motions of various water users to intervene in an interstate water dispute, and those parties did not file exceptions to the Master's recommendation); *Arizona v. California*, 345 U.S. 914 (1953) (denying motion of Sidney Kartus et al. for leave to intervene); *New Jersey v. New York*, 345 U.S. at 372-74 (denying motion of City of Philadelphia for leave to intervene); *Nebraska v. Wyoming*, 296 U.S. 548 (1935) (denying motion of Platte Valley Public Power & Irrigation District for leave to intervene); *see also* Report of the Special Master, *Alaska v. United States*, No. 128, Orig. (U.S. filed Nov. 27, 2001) (denying intervention as a party defendant in an action under the "equal footing doctrine" by private parties with an alleged interest in Alaskan waters).

Before granting a motion to intervene, the Court requires that a potential intervenor demonstrate (1) a "compelling interest in [its] own right," (2) "apart from [its] interest in a class with all other citizens and creatures of the state," (3) "which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373. That standard, which is based on the "'*parens patriae*' doctrine," reflects "the principle that the state, when a party to a suit involving a matter of sovereign interest, '*must* be deemed to represent all its citizens.'" *Id.* at 372 (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930)) (emphasis added). This approach is a "necessary recognition of sovereign dignity, as well as a working rule for good judicial administration," so that

the Court is not "drawn into an intramural dispute over the distribution of water within [a State]." *Id.* at 373. Applying that test, the Court has previously denied similar efforts to intervene in an original action for equitable apportionment based on like claims, recognizing that any interest a city has in its "own water system . . . is *invariably* served by the [party State's] position" and further noting the city's failure to identify "a single concrete consideration in respect to which the [party State's] position does not represent [the city's] interests." *Id.* at 374 (emphasis added).

In this case, proposed intervenors have similarly failed to identify any interest not adequately represented by North Carolina. Moreover, North Carolina has disputed arguments that it will not represent the interests of intervenors. *See* May 27, 2008 Recommendation at 9 (referring specifically to Charlotte).[9] As in *New Jersey v. New York*, proposed intervenors seek to inject into this suit an intramural dispute about the allocation of water among individual water users within a State. But those users' state-law rights are adequately protected by North Carolina, *see New Jersey v. New York*, 345 U.S. at 373, 374; *Kentucky v. Indiana*, 281 U.S. at 173, whose *parens patriae* responsibilities necessarily preclude both "cities" and "corporate creatures of the state" from intervention in cases involving equitable apportionment, *New Jersey v. New York*, 345 U.S. at 372-74;

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[9] Further demonstrating that North Carolina is at least as equipped as proposed intervenors themselves adequately to represent their interests, counsel for Charlotte has asserted that "Charlotte desires and intends to coordinate with North Carolina on technical analysis and expert analysis and gathering of field data, if necessary." Aug. 22, 2008 Telephonic Conference Tr. at 24.

see also United States v. Nevada, 412 U.S. at 538; *accord Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995) ("We have said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States.").

The Report relies for authority on this Court's cases (1) permitting participation by entities, including state public agencies, forcibly joined by plaintiffs as *defendants* (Report at 12-19); (2) permitting intervention in original (but not equitable apportionment) actions where intervention was unopposed and a third party's real property interest was adjudicated or a requirement that a pipeline company pay an allegedly unconstitutional state tax where no one State could adequately represent that company's interest (*id.* at 19-21); or (3) permitting intervention in water disputes by a sovereign Indian tribe (*id.* at 24-25). Those cases are inapposite. This case concerns (1) entities seeking to intervene, not entities named as party defendants; (2) state-law user rights of water — a fungible resource — not real property rights in land or a state tax laid directly on an intervenor's pipeline; or (3) intervention by non-sovereigns, not sovereign Indian tribes, whose unique status the Court has long recognized, *see, e.g.*, *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).

Although the recommendation recognizes that South Carolina is "master of its complaint," it states, without citation, that this rule "has less force in original jurisdiction cases," where the Court has discretion to decline to hear a dispute between two States or

can dismiss private parties named in a complaint. Report at 16-17. The Court's leading precedent is expressly to the contrary. In *New Jersey v. New York*, this Court rejected the City of Philadelphia's argument that it should be permitted to intervene because the City of New York, which had been "forcibly joined as a defendant to the original action," was already a party, noting that "New York City was not admitted into this litigation as a matter of discretion at her request." 345 U.S. at 374-75.

Moreover, the fact that this Court has, on one occasion identified by the Report (at 17-19), even expelled entities named as party *defendants* to an original action further demonstrates the limits of participatory rights in original actions. In *Kentucky v. Indiana*, the Court *dismissed* private defendants because the injunction sought against them by Kentucky "for the purpose of . . . restraining the prosecution of [a] suit in the state court" was "not needed, as a decree in this suit would bind the state of Indiana" and, therefore, would of its own force "bar any inconsistent proceedings" in Indiana state courts. 281 U.S. at 175. The same is true here. Any decree would bind proposed intervenors, "through representation by their respective States," from taking actions inconsistent with the decree. *Nebraska v. Wyoming*, 515 U.S. at 22. Therefore, to the extent *Kentucky v. Indiana* has relevance here, it suggests that South Carolina would have lacked the authority if it had named Charlotte, CRWSP, or Duke as a defendant in this case. But the observation that the Court has in one case *dismissed* non-essential, non-sovereign defendants in no way suggests that in another it can bypass the defendant State's duty as *parens patriae* to represent the interests of all citizens and *admit*

non-essential, non-sovereign defendants over the objection of the complaining State.[10]

Finally, the Report gives no weight (at 23) to the Court's requirement that a potential intervenor demonstrate a "compelling interest in [its] own right," "which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373. Rather, the Special Master focuses on whether each proposed intervenor can demonstrate an interest without regard to the adequacy of North Carolina's ability to defend that intervenor's interests. That approach is inconsistent with this Court's longstanding view that intervention in original actions should be rare and its emphasis that, in an original action, "each State 'must be deemed to represent all its citizens.'" *Nebraska v. Wyoming*, 515 U.S. at 21-22 (quoting *Kentucky v. Indiana*, 281 U.S. at 173). At a bare minimum, the Court's standard requires a potential intervenor "to point out a single concrete consideration in respect to which the [State's] posi-

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[10] Most of the cases cited in the Report admitting third parties as party defendants were decided at a time when it was unclear whether private parties would be bound by the results of an equitable apportionment action if they were not joined by the plaintiff as party defendants. *See Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (raising but not deciding the question whether individual water-rights claimants in the defendant State should be joined as party defendants by the plaintiff State). "Not surprisingly, the practice soon developed of joining persons or entities within the defendant state whose claims appeared to be at stake." 4 Robert E. Beck et al., *Waters and Water Rights* § 45.03(b), at 45-20 (1991 ed., 2004 replace. vol.). In 1932, the Court clarified that an equitable apportionment decree binds the citizens. *See Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932); *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). Since then, "individual water claimants usually have not been joined in equitable apportionment suits." 4 Beck § 45.03(b), at 45-21.

tion does not represent [the potential intervenor's] interests." *New Jersey v. New York*, 345 U.S. at 374.[11] The Report, however, does not identify *any* "concrete consideration" in which the interests of proposed intervenors diverge or in which North Carolina, as *parens patriae*, does not adequately represent their interests.

B. The Proposed Intervenors Are Not Entitled To Intervention

1. *Charlotte and CRWSP*

The Report reasons that, although there is no respect in which North Carolina does not adequately represent the interests of Charlotte and CRWSP, they may nonetheless properly intervene because certain of their water withdrawals are specified in the Complaint, making them "authorized agents" of South Carolina's alleged injury. Report at 21-28. However, as the Special Master held in Case Management Order No. 8 Regarding Scope of the Complaint, South Carolina has prayed for a decree equitably apportioning the Catawba River and challenges any and *all* withdrawals from the river in excess of North Carolina's equitable share; South Carolina does not limit its allegations of harm to any particular withdrawals. Case Management Order No. 8, at 4 (Sept. 24, 2008). Accordingly, under the Report's reasoning, potentially *all* North Carolina water users are "authorized agents" of South Carolina's harm. Water is, of course, largely fungible. The *cumulative* effect of the withdrawals in North Carolina results in low flows

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[11] *Cf.* 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1909, at 414-22 (3d ed. 2007) (under Federal Rule of Civil Procedure 24(a)(2), it will be presumed, "in the absence of a very compelling showing to the contrary, [that] . . . a state . . . adequately represent[s] the interests of its citizens").

across the border harming South Carolina; South Carolina's injuries are not limited to those caused by proposed intervenors' activity. It is of no consequence to South Carolina whether water is withdrawn by any specific North Carolina user; what matters is the amount of water ultimately available to South Carolina users downstream.

The Report elides that important characteristic of South Carolina's Complaint and thus fails to distinguish *New Jersey v. New York* and the defendant City of New York in that case. The *sole* basis of New Jersey's complaint against the State of New York was the City of New York's proposed construction of dams, and New Jersey's *sole* goal was to terminate construction of those dams.[12] On that basis, this Court accepted original jurisdiction over a suit in which New Jersey named the City of New York as a party defendant, while denying the City of Philadelphia's motion to intervene. South Carolina's Complaint here is broader than the authorized interbasin transfers of water by Charlotte and CRWSP — merely two entities in a class with all other citizens and creatures of the State,[13] *see New Jersey v. New York*,

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[12] *See* Report of the Special Master at 7-8, *New Jersey v. New York*, No. 16, Orig. (U.S. filed Feb. 2, 1931).

[13] The Report thus overstates the importance of South Carolina's choice to name two Interbasin Transfers ("IBTs"), among many others, in its Complaint. The two examples were chosen because they were recent, high-profile transfers that attracted substantial media attention, which made them — in South Carolina's view — particularly useful in describing both the current harms alleged in the Complaint and their continued effects for the foreseeable future. North Carolina has identified at least 22 other IBTs transferring water outside the Catawba River Basin, which North Carolina's interbasin transfer statute expressly authorizes (but for which a specific permit is not

345 U.S. at 373, who stand in the same position with regard to their interests in ensuring that any equitable apportionment enforced by the Court does not disrupt their current water usage. Accordingly, the Report, if accepted, would recognize the interests of entities in such a way as to preclude any "practical limitation on the number of citizens . . . who would be entitled to be made parties." *Id.*

Furthermore, in *New Jersey v. New York*, the City of New York was "forcibly joined as a defendant," not "admitted into th[e] litigation as a matter of discretion at her request." *Id.* at 375. The Report misunderstands the Court's observation that the City of New York was the "authorized agent" of injuries threatened against the citizens of New Jersey. *Id.* That observation was made merely to explain why the plaintiff in that case chose to name the City of New York as a defendant and *not* to illuminate anything about the relevant justification for permitting the City of New York to participate in the case — an issue that was not before the Court.

In sum, Charlotte and CRWSP are consumers of water from the Catawba River; the size of their withdrawals does not entitle them to independent party status when North Carolina can adequately represent their interests in its role as *parens patriae*.

2. *Duke*

The Special Master concluded that Duke has a "unique and compelling interest in defending the terms of its current [FERC] license and the [Com-

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required). *See* South Carolina Br. in Response to CMO No. 3 As to the Scope of the Complaint at 5 & Ex. 1 (Mar. 20, 2008). In addition, numerous other consumptive withdrawals are also affected on an ongoing basis.

prehensive Relicensing Agreement ("CRA"), pending before FERC]," May 27, 2008 Recommendation at 11, and that Duke's "interest in defending [the CRA], as well as its current and future licenses . . . , [is] sufficient to warrant intervention," *id.* at 12. But by its plain terms the CRA does not control any of the disputed water consumption in North Carolina that is at issue;[14] rather, it seeks to establish a protocol for whatever water remains in the Catawba River after North Carolina users have withdrawn water.[15]

South Carolina's Complaint alleges inequitable water consumption in North Carolina during times when the Catawba River's flow is inadequate. South

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[14] Duke's own relicensing application to FERC acknowledges and assumes that numerous actual or potential water withdrawals from the Catawba River will be under neither FERC's nor Duke's control. With respect to IBTs in particular, Duke's Application states as follows:

> **Inter-Basin Water Transfers:** Stakeholders are extremely concerned about the current and projected future amount of water being withdrawn from the Catawba-Wateree River Basin to be transferred to adjacent basins and not returned to the Catawba-Wateree River Basin. While growth in inter-basin transfers was included in future water demand projections, *this Application does not comprehensively assess nor take a position on the approval of such future requests. Public policy for inter-basin water transfers is clearly the exclusive jurisdiction of the state agencies and was, therefore, not addressed during the relicensing process.*

Duke Energy Application for New License at ES-21, Catawba-Wateree Project (FERC No. 2232) (FERC filed Aug. 29, 2006) (emphasis added).

[15] Indeed, § 39.9 of the proposed CRA expressly *disclaims* resolution of the water-rights issues raised in this case: "Water Rights Unaffected This Agreement does not release, deny, grant or affirm any property right, license or privilege in any waters or any right of use in any waters." CRA § 39.9.

Carolina seeks a decree from this Court that would curtail withdrawals from the river during times of inadequate flow, which would necessarily *increase* the amount of water available to Duke for the generation of hydropower and ultimately for discharge into South Carolina. Such increase in available water would make it easier, not harder, for Duke to meet any water supply obligations imposed by FERC.

The decree sought by South Carolina, therefore, neither threatens nor impairs Duke's ability to manage water in dispute here. Indeed, the only way in which South Carolina's request for a decree providing equitable apportionment could implicate Duke's interests would be if it limited Duke's ability to *consume* that water. Duke has not asserted any interests as a consumer of water, and, even if it had, it would nonetheless stand in the same position as Charlotte and CRWSP, whose interests as water users are not unique, but shared by a class of all citizens and creatures of the State, *see supra* pp. 18-19 (citing *New Jersey v. New York*, 345 U.S. at 373). To the extent Duke consumes water in North Carolina, that State represents its interests in this case; the same is true of South Carolina, to the extent Duke consumes water on that side of the boundary. In any event, this Court's determination of the party States' respective rights to the Catawba River poses no conflict with FERC's determination of the terms and conditions of Duke's hydropower license.[16] Rather

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[16] FERC's practice has been to craft licenses so as not to intrude on any equitable apportionment by the Court. *See, e.g., Virginia Electric Power Company d/b/a Dominion Virginia Power/Dominion North Carolina Power*, 110 FERC ¶ 61,241, at 61,948 (2005) ("[T]his Agreement shall not be construed to limit in any way any right of the State of North Carolina . . . to seek an equitable apportionment of the waters of the Roanoke

than allow Duke full party status, as the Report recommends, the Court can take judicial notice of the CRA's terms, in the event that it is approved by FERC.

Nor should Duke be permitted to intervene merely to provide the Court with access to information about Duke's operational control of river flows. If such information would aid the Court's analysis, as the Special Master suggests, *see* Report at 28-29, that information can be obtained through other means, such as third-party subpoenas. The appropriate role for interested persons with relevant matter not already brought to the Court's attention by parties to the case is that of *amicus curiae*.[17] The Court's practice of granting leave to non-governmental entities seeking to participate as *amici curiae*[18] under Rule 37.3[19] renders the *amicus* role better suited to balance the interests alleged in this case by Duke, as

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River."); *see also PacifiCorp*, 105 FERC ¶ 62,207, at 64,476 (2003) ("[n]othing in this article shall require the licensee to violate its obligations under . . . , or permit or require any action inconsistent with, the water contracts and agreements, interstate compact, judicial decrees, state water rights, and flood control responsibilities"), *clarified on reh'g*, 106 FERC ¶ 61,307 (2004).

[17] CRWSP concedes that, "whether the [proposed] Intervenors participate in this case as parties or as amici, their legal arguments would be the same." CRWSP Letter Br. 2.

[18] *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 749, 761 (2000) (observing the Court's "open door policy" toward *amicus curiae* briefs and documenting an 800% increase in the number of *amicus* filings during the last half of the twentieth century).

[19] A non-governmental entity may participate as an *amicus curiae* either with the consent of all parties, *see* Sup. Ct. R. 37.3(a), or with the Court's permission, *see* Sup. Ct. R. 37.3(b).

well as Charlotte and CRWSP, against the Court's precedent strongly disfavoring intervention under these circumstances. The Report fails to explain why such a role would not enable each of the proposed intervenors sufficient opportunity to represent their interests.

CONCLUSION

The motion of the State of South Carolina for leave to file exceptions to the First Interim Report of the Special Master should be granted, and briefing on those exceptions to be filed should be expedited to ensure a decision before the close of the October 2008 Term. In the alternative, the Court should deny the motions for leave to intervene for the foregoing reasons and those stated in South Carolina's previously filed oppositions to the motions for leave to intervene.

Respectfully submitted,

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December 9, 2008

IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to be served have been served. On December 9, 2008, I caused three copies of the Motion of the State of South Carolina for Leave To File Exceptions to First Interim Report of the Special Master and Brief in Support of Its Motion for Leave To File Exceptions to be served by first-class mail, postage prepaid, and by electronic mail (as designated) on the Special Master, the State of North Carolina, and each of the proposed intervenors on the attached service list.

David C. Frederick
Special Counsel to the
State of South Carolina

No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

CATAWBA RIVER WATER SUPPLY PROJECT;
CITY OF CHARLOTTE, N.C.; AND
DUKE ENERGY CAROLINAS, LLC,

Intervenors.

On Motion for Leave to File Exceptions to the First Interim Report of the Special Master

INTERVENORS' RESPONSE TO THE MOTION OF THE STATE OF SOUTH CAROLINA FOR LEAVE TO FILE EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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INTERVENORS' RESPONSE TO THE MOTION OF THE STATE OF SOUTH CAROLINA FOR LEAVE TO FILE EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

South Carolina has asked this Court for immediate, interlocutory review of the Special Master's interim report, granting the motions to intervene of Duke Energy Carolinas, LLC ("Duke"), Catawba River Water Supply Project ("CRWSP"), and City of Charlotte, North Carolina ("Charlotte") (collectively hereafter, "Intervenors") and, subsequently, declining to reconsider that decision. South Carolina has also sought reversal of those decisions. Pursuant to direction provided by the Clerk's Office on December 11, 2008, this Response addresses only South Carolina's arguments in support of leave to file exceptions to the First Interim Report. If the Court requests a response to South Carolina's arguments regarding the merits of the First Interim Report, the Intervenors will promptly respond.

INTRODUCTION

South Carolina instituted this original action against North Carolina seeking an equitable-apportionment of the Catawba River, which flows from North Carolina into South Carolina. The River contains 11 impoundments and 13 hydroelectric facilities, all operated, managed and controlled by Duke, pursuant to a hydroelectric license issued by the Federal Energy Regulatory Commission, which authorizes Duke to "effectively control" the flow in the River. First Interim Report at 28. South Carolina alleges that reduced flows of the Catawba

River are exacerbated by inter-basin transfers of certain named North Carolina public entities pursuant to applicable law. The entities identified by South Carolina are intervenor Charlotte, Union County, North Carolina (one of two co-venturers that formed intervenor CRWSP, an interstate wholesale water provider), and the cities of Concord and Kannapolis, North Carolina.

The Complaint includes factual allegations about Duke's use of the Catawba River through its hydroelectric power generation facilities located in both North and South Carolina. *See, e.g.*, Complaint at ¶¶ 2 and 14. The Complaint identifies the inter-basin transfer of Charlotte and the inter-basin transfer of Union County, North Carolina, initiated by CRWSP from an intake located in South Carolina. *See id.* at ¶¶ 20(a) and 21. According to the Complaint, these transfers reduce the amount of water available to South Carolina, aggravate the existing natural conditions and droughts, and exceed North Carolina's equitable share of the Catawba River. *See id.* at ¶ 24. Except for the cities of Concord and Kannapolis, North Carolina (which do not seek to intervene in this action) and the Intervenors, the Complaint does not contain any specific averments against any other potential water withdrawer or user.

In the First Interim Report dated November 25, 2008 ("First Interim Report"), the Special Master recommended that the Court grant the motions to intervene of the three non-state entities specifically targeted by South Carolina in its Complaint – Duke,

Charlotte and CRWSP. None of the Intervenors asserts any claim for relief against South Carolina.[1]

The Special Master recognized that CRWSP "'is the authorized agent for the execution of the sovereign policy which threaten[s] injury to the citizens of [South Carolina].'" First Interim Report at 26-27 (quoting *New Jersey v. New York*). Accordingly, the Special Master correctly concluded that CRWSP should be allowed to appear separately in order to defend its transfer, which is the subject of South Carolina's claim for relief." *Id.* at 27-28. As an interstate entity, CRWSP is not adequately represented by South Carolina, given South Carolina's unabashed targeting of CRWSP's transfer of water to one of its owners, Union County, North Carolina. Of equal importance is the fact that North Carolina will not champion any increase in flow into South Carolina, which would be of benefit to CRWSP and its owners, including Union County, North Carolina.

The Special Master also correctly recognized that "Charlotte is the entity in North Carolina vested with authority to carry out the large majority of the inter-basin transfers of which South Carolina complains." *Id.* at 21. Charlotte is the only entity in North Carolina currently executing a substantial inter-basin transfer of water from the North Carolina portion of the Catawba River pursuant to a Certificate issued by North Carolina, and thus the

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[1] Pleadings, transcripts, orders, and other case related documents filed by or with the Special Master are available at http://www.mto.com/sm.

only entity whose current actions in the North Carolina portion of the River have been alleged by South Carolina to be a source of harm to that State's interests. The Special Master accurately noted that Charlotte "is the 'authorized agent' of a large part of South Carolina's claimed injury." *Id.* at 22. Accordingly, the Special Master concluded that "[e]ven though Charlotte has not been named by South Carolina as a defendant, for practical purposes non-incidental relief is sought against it," and it should have the opportunity to intervene for purposes of protecting its interests. *Id.* at 22-25.

Turning to Duke, the Special Master noted that Duke "is positioned differently from Charlotte and CRWSP." *Id.* at 28. Duke "effectively control[s] the flow of the Catawba through the impounding of water in reservoirs and the release of that impounded water." *Ibid.* The Special Master recognized that Duke "has several strong and independent interests that could affect, or be affected by, the outcome of this proceeding." *Ibid.* Specifically, the interim report acknowledged that Duke's control over the Catawba's flow, as well as "the terms of its existing and prospective [FERC] licenses," *id.* at 29, and its interest in the Comprehensive Relicensing Agreement and the process that led to that Agreement, could all be directly impacted by the outcome of this litigation. *Id.* at 32.

In her well-reasoned and detailed ruling, the Special Master correctly concluded that this Court's precedents provide a workable and appropriate standard for deciding motions to intervene by non-state entities in original jurisdiction matters, including equitable-apportionment cases. *Id.* at 12-

21. The Special Master also correctly determined that each of the Intervenors is entitled to join in this action, either because of a property interest in the River, or because of an interest or interests in the River sufficiently distinct, direct, compelling, and concrete to satisfy the standard applied by this Court in previous original actions. *Id.* at 25 (Charlotte); *id.* at 28 (CRWSP); *id.* at 32 (Duke). In addition to recommending that the Intervenors be permitted to intervene, the First Interim Report also denies South Carolina's motion seeking clarification or reconsideration of the recommended ruling on intervention. *Id.* at 32-35 (denying motion for clarification) and 36-42 (denying motion for reconsideration).

On December 9, 2008, South Carolina filed a motion for leave to file exceptions to the First Interim Report. South Carolina's principal assertions in support of its motion are: (1) the Special Master's ruling will significantly increase the costs of litigation to South Carolina and protract the resolution of this action if not reviewed at this time; (2) the appropriate standard for intervention in equitable-apportionment cases under the Court's original jurisdiction is unsettled and warrants immediate review; and (3) the Special Master's ruling will "open the floodgates for numerous non-state entities" to seek leave to intervene in other matters arising under the Court's original jurisdiction. As discussed below, all of these arguments lack merit. South Carolina's motion should be denied; and instead, the Court should consider any exceptions simultaneously, including those to intervention,

when the Court reviews the Final Report of the Special Master.

ARGUMENT

I. THE COURT SHOULD DECLINE TO ENTERTAIN EXCEPTIONS TO THE FIRST INTERIM REPORT

A. The Intervenors' Party Status Will Neither Prejudice South Carolina Nor Delay The Resolution Of This Action

South Carolina claims that the First Interim Report should be reviewed now because intervention by three non-state entities in this action will impose a "substantial and immediate burden on South Carolina without appropriate legal or factual justification." Mot. for Leave to File Exceptions to First Interim Report at 7. To bolster this argument, South Carolina relies on the *Guide for Special Masters in Original Cases Before the Supreme Court of the United States* as "specifically identifying motions to intervene as falling into a special category of motions" that reflect the Court's interest in reviewing such motions. *Ibid.* Neither the claim of prejudice nor the contention that this Court generally conducts interlocutory review of intervention orders withstands examination.

First, because the Intervenors are not injecting into this original jurisdiction action any claim or issue not already before the Court, their participation does not expand the scope of the equitable-apportionment claim, and thus does not substantively prejudice South Carolina. This Court

has made clear that a non-state party may intervene in an original action where, as here, that non-state party does not seek to expand the scope of the issues raised by the state parties. *See* Robert L. Stern et al., Supreme Court Practice 554 (8th ed. 2002) ("provided at least one state is on each side of the controversy, the presence of nonstate parties, even indispensable parties, does not affect the exclusive jurisdiction of the Supreme Court."). Thus, contrary to the suggestions by South Carolina, *see* Mot. for Leave to File Exceptions to First Interim Report at 8, the Court's refusal to consider exceptions to the First Interim Report at this time and allow the continued participation of the Intervenors in this litigation does not result in any material prejudice to South Carolina's interests.

Indeed, thus far, South Carolina has benefited by the Intervenors' party status. For example, South Carolina has served discovery directly on the Intervenors without the added expense, delay, and complexity of conducting third-party discovery.[2] At least some of that discovery, *e.g.*, interrogatories, is only available to South Carolina so long as the Intervenors remain parties. In addition, South Carolina's discovery efforts are extensive, ongoing, and simply mirror in scope or content the averments

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[2] While it is true that each of the Intervenors has its own legal counsel, that does not burden South Carolina and would be the case if South Carolina were pursuing third-party discovery from the Intervenors. For example, at least some of the recipients of third-party subpoenas already served by South Carolina had their own legal counsel.

in the Complaint lodged against the Intervenors that resulted in the motions to intervene.

The related assertion by South Carolina that "catch up" discovery will unduly delay the deposition and trial phases of this case is also unfounded. If this Court declines to hear exceptions now, Intervenors can participate fully in discovery and there will be no need for a catch-up period. Case Management Order 7 ("CMO 7"), which was entered by the Special Master on September 18, 2008, expressly states that the discovery procedures set forth in the order will govern discovery by and from the Intervenors "pending the Special Master's issuance of an Interim Report regarding the issue of intervention and any proceedings in the Court with respect to such Interim Report." CMO 7 at ¶ 2. Hence, a refusal by this Court to entertain exceptions to the First Interim Report will lift those restrictions and factual development of this case will proceed in a timely and typical manner. Discovery in the case currently is not proceeding in a timely and typical manner because of South Carolina's request for an interim report on the intervention decision and its pursuit of immediate review thereof.

Until the intervention issue is resolved, however, CMO 7 imposes restrictions on the Intervenors' ability to participate in discovery. If the Court considers exceptions to the First Interim Report, those restrictions will remain in place until the Court issues its decision thereby delaying, rather than expediting, the factual development and disposition of this case.

Second, South Carolina argues that it will be burdened by increased litigation costs if the

Intervenors are permitted to participate in this action. Mot. for Leave to File Exceptions to First Interim Report at 8. In actuality, however, the participation of the Intervenors is the inevitable and direct result of the allegations of South Carolina's complaint which is specifically focused on the Intervenors. The "cost concern" is embodied within and addressed by the standard governing intervention. Implicit in the recommendation to allow intervention in this case (or any other case) is that the cost concerns of the named parties must yield to the substantive interests of the proposed intervenors. Litigation costs (and the risk that they will increase substantially) are implicated by every interlocutory order. Because most interlocutory orders, including decisions granting intervention, can be effectively reviewed at the conclusion of litigation, this Court and the lower federal courts hold that immediate review of an interlocutory order granting intervention is not warranted regardless of alleged cost concerns. *See J.B. Stringfellow, infra.*

South Carolina also asserts that the parties will be burdened in the form of increased costs and expenses of the Special Master if intervention is permitted. Mot. for Leave to File Exceptions to First Interim Report at 8 n.5. This contention is without basis. Intervention does not change the averments in the Complaint or the breadth of discovery that South Carolina may pursue regardless of intervention. The Intervenors have no interest in making this litigation more protracted or costly than it otherwise would be, and the Special Master has the tools necessary to prevent any cumulative or unnecessary proceedings and costs. In addition, though South Carolina seeks

to attribute the majority of intervention-related costs to the Intervenors' actions, the reality is that the Intervenors only filed their respective motions to intervene. Since then, South Carolina has filed a motion for clarification or, in the alternative, reconsideration (which was briefed and argued to the Special Master), a motion seeking the issuance of an interim report (which was briefed and argued to the Special Master), and this motion for leave to file exceptions to the First Interim Report. Further, the prospect of three more parties bearing some share of the cost of the Special Master is highly unlikely to increase South Carolina's proportionate share. The suggestion by South Carolina that the Intervenors are the source and cause of "substantial" additional intervention-related costs is fiction.

As part of its cost argument, South Carolina argues that it should be permitted to seek immediate review of the order granting intervention because it is a State and its litigation costs "will be borne out of public funds." Mot. for Leave to File Exceptions to First Interim Report at 9. This claim is without merit. First, the cases discussing the standard for allowing intervention in original actions and the cases limiting the right to seek immediate review of decisions granting intervention do not draw distinctions between public and private entities. Second, although overlooked by South Carolina, even if the status of the parties was relevant to the intervention decision (which it is not), CRWSP is a joint venture of two *public* entities (Lancaster County Water and Sewer District, South Carolina and Union County, North Carolina), Charlotte is a *public* entity, and North Carolina is a *public* entity. The cost and

burden concerns voiced by South Carolina, *see* Mot. for Leave to File Exceptions to First Interim Report at 9 n.6, are further dispelled by the practical reality that whether the Intervenors participate as parties or as third-parties and/or amici, their legal arguments will be the same and South Carolina will be required to address them. Similarly, whether or not the Intervenors remain in the case as parties, South Carolina will continue to incur the costs of seeking discovery from the Intervenors on the issues framed by the pleadings. Indeed, the Intervenors' participation in this case as parties benefits South Carolina in that it will be able to avoid the expense, delay, and limits of third-party discovery, and expand the discovery devices available (*e.g.*, interrogatories) so long as the Intervenors remain in the case.

Third, Rule 17.2 of the Rules of the Supreme Court of the United States notes that in cases arising under the Court's original jurisdiction, the Federal Rules of Civil Procedure "may be taken as guides." *See* Rule 17.2. Rule 24 of the Federal Rules of Civil Procedure governs intervention. Thus, contrary to South Carolina's contention otherwise, *see* Mot. for Leave to File Exceptions to First Interim Report at 9 n.6, cases applying that rule are relevant to this motion. This Court and lower federal courts applying Rule 24 of the Federal Rules of Civil Procedure uniformly hold that orders granting intervention are *not* subject to immediate appeal because they can be effectively reviewed on appeal from a final judgment or, as applicable in this case, Final Report. *See, e.g.*, *J.B. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987); *SEC v. Chestman*, 861 F.2d 49, 50 (2d Cir. 1988) (*per curiam*); *see generally* 15B

Wright & Miller, Federal Practice and Procedure § 3914.8.

Fourth, the *Guide for Special Masters in Original Cases Before the Supreme Court of the United States* (which has no authoritative weight) does not characterize interim reports on motions to intervene as falling into a "special category" or, as claimed by South Carolina, reflect the "typical practice" or "usual practice" of the Court regarding whether to entertain exceptions to an interim report. Instead, the *Guide* simply uses an interim report on a motion to intervene in *Alaska v. United States*, No. 128 Original, as an example of a case in which an interim report was filed. There are many counter-examples of cases in which the Court did not address the Special Master's ruling on intervention until the final report – or, at least, until a report that contained additional recommendations on the merits. *See Nebraska v. Wyoming*, 507 U.S. 584, 589 (1993) (report resolved summary judgment as well as intervention); *South Carolina v. Baker*, 485 U.S. 505, 510-11 (1988) (final report addressed both intervention and merits); *Arizona v. California*, 460 U.S. 605, 612-13 (1983) (noting that the Court had earlier refused to allow exceptions to the special master's intervention decision, *see* 444 U.S. 1009, and considering the propriety of intervention along with other issues in the master's final report).

Finally, neither of the cases cited in the *Guide* – *Alaska v. United States*, No. 128 Original, and *New Jersey v. New York*, No. 120 Original – actually supports South Carolina's request for leave to file exceptions. In both cases, the Court simply ordered the Special Master's report filed and entered a ruling

on the motion to intervene without considering exceptions. *See Alaska v. United States*, 534 U.S. 1103 (2002) (ordering report of Special Master filed and entering ruling on motion to intervene); *New Jersey v. New York*, 514 U.S. 1125 (1995) (same). Thus, the *Guide* contradicts, rather than supports, South Carolina's assertion that it is the "usual" or "typical" or "ordinary" practice of the Court to entertain exceptions to an interim report on intervention.

B. It Is Well-Established That Intervention In Original Actions Is Appropriate Under Certain Circumstances And The Recommendation Of The Special Master Does Not Risk Encouraging Non-State Entities To Seek To Intervene In Original Actions

In support of its request to file exceptions, South Carolina contends that the standard for intervention in equitable-apportionment actions within this Court's original jurisdiction is unsettled. Mot. for Leave to File Exceptions to First Interim Report at 3. The Court, however, has faced the issue of intervention in original actions by non-state entities previously, and there is no reason to treat original equitable-apportionment actions differently from other original actions.

This Court consistently holds that it is appropriate on occasion to allow non-state parties to intervene and participate in original actions. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981); *Texas v. Louisiana*, 426 U.S. 465 (1976); *Utah v. United States*, 394 U.S. 89 (1969). This makes sense

given that the Court has allowed municipalities and other entities to participate as defendants in original actions where their interests are directly challenged, such as where the complaining state challenges a diversion of water to that municipality. The Court has permitted this even where the state in which the municipality was located was a party to the action and had interests aligned with those of the municipality. *See, e.g., New Jersey v. New York*, 345 U.S. 369 (1953); *Missouri v. Illinois*, 180 U.S. 208 (1901); *Kansas v. Colorado*, 206 U.S. 46 (1907).

South Carolina's contention that the Court (or Special Master) risks being inundated with intervention motions in equitable-apportionment cases brought under the Court's original jurisdiction is unfounded. South Carolina identifies only one equitable-apportionment case now pending, and that case does not implicate a motion to intervene. *See* Mot. for Leave to File Exceptions to First Interim Report at 9-10.[3] In any event, it strains credulity to conclude that an immediate review of the Special Master's intervention decision in this case will be determinative of whether any motions to intervene are pursued or the outcome of such motions in any other cases.

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[3] South Carolina points to a second case, *Georgia v. Florida*, in which intervenors seek certiorari review of a Court of Appeals for the D.C. Circuit decision having nothing whatsoever to do with this Court's original jurisdiction, interstate water disputes, or equitable-apportionment. That case deals instead with the application of a federal statute to the U.S. Army Corps of Engineers' operation of a federal reservoir.

CONCLUSION

For the foregoing reasons, South Carolina's motion for leave to file exceptions to the First Interim Report should be denied.

Respectfully submitted,

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December 18, 2008

No. 138, Original

In the

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Exceptions to First Interim Report of the Special Master

NORTH CAROLINA'S BRIEF IN OPPOSITION TO SOUTH CAROLINA'S MOTION TO FILE EXCEPTIONS TO THE SPECIAL MASTER'S FIRST INTERIM REPORT

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INTRODUCTION

North Carolina files this Brief in Opposition to South Carolina's motion for leave to file exceptions to the Special Master's First Interim Report.

North Carolina did not oppose the petitions of the three Intervenors to intervene in this case, but at the same time filed no brief in support thereof before the Special Master. North Carolina did not oppose these interventions because South Carolina's Bill of Complaint unequivocally challenges the Intervenors' actions and interests and because North Carolina believes that their presence in the case will be of assistance to the parties and the Court in elucidating the complex facts involving the Catawba River and the Intervenors' actions in connection therewith. Like the Intervenors, North Carolina believes that the Special Master correctly allowed the interventions for the right reasons and has well supported those reasons in her Interim Report.

ARGUMENT

For the reasons elaborated in the Opposition Brief of the Intervenors, North Carolina opposes the diversion of energy and resources from the very extensive discovery required in this case to deal with the filing of exceptions and briefing in connection with an interlocutory appeal of the Special Master's decision. North Carolina agrees with Intervenors that South Carolina in her motion has greatly exaggerated her burdens resulting from the interventions. So far, South Carolina's main expense has been involved in disputing the interventions and the Special Master's initial Order, by parties whose actions South Carolina

challenged by name in her own Bill of Complaint. In contrast, the Intervenors have undertaken to coordinate their actions so as to minimize any additional burden their presence might make. As Intervenors point out, South Carolina has availed herself of the opportunity to engage in extensive discovery of Intervenors, who possess a wealth of relevant knowledge in this case.

In her motion, South Carolina argues that allowing the intervention will open the floodgates to all others. South Carolina, however, downplays the degree to which her Bill of Complaint singles out the Intervenors' conduct. The First Interim Report of the Special Master correctly notes that the Bill of Complaint almost exclusively deals with interbasin transfers. Specifically, the First Interim Report states:

> a fair reading of South Carolina's Complaint and other papers, including its preliminary injunction motion, shows that interbasin transfers are not merely "mentioned," but are the primary if not exclusive means by which South Carolina claims to have been harmed.

(First Interim Report of the Special Master at 38) The Special Master also accurately observes that the activities of the three Intervenors are mentioned by name. (*Id.* at 21, 26-27, 31) South Carolina's Bill of Complaint is squarely based upon her assertion that North Carolina's interbasin transfers "exceed North

Carolina's equitable share of the Catawba River." (Bill of Compl. ¶ 4) The motions to intervene have been brought by three entities whose conduct is expressly referenced in the Bill of Complaint. Accordingly, South Carolina's assertion that the Special Master's order will result in a myriad of other water users seeking to intervene is without merit.

CONCLUSION

South Carolina's motion to file exceptions to the Special Master's First Interim Report should be denied.

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No. 138, Original

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v.

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EXCEPTIONS TO FIRST INTERIM REPORT OF THE SPECIAL MASTER

In an equitable apportionment action between two States brought under this Court's original jurisdiction, intervention by a non-state entity is proper only when the putative intervenor demonstrates (1) a "compelling interest in [its] own right," (2) "apart from [its] interest in a class with all other citizens and creatures of the state," (3) "which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam). The State of South Carolina excepts to the following conclusions of the Special Master:

1. That intervention is proper regardless of whether the party States adequately represent the movant's interests, whenever the movant is the "instrumentality" authorized to engage in conduct alleged to harm the plaintiff State, has an "independent property interest" at issue in the action, or otherwise has a "direct stake" in the outcome of the action. *See* First Interim Report at 10-21.
2. That the City of Charlotte, North Carolina, the Catawba River Water Supply Project, and Duke Energy Carolinas, LLC should be permitted to intervene in this original action. *See* First Interim Report at 21-32.

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City of Stilwell v. Ozarks Rural Elec. Coop. Corp., 79 F.3d 1038 (10th Cir. 1996) 27

Colorado v. Kansas, 320 U.S. 383 (1943) 29, 43

Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972 (D. Mass. 1943) 54

Fiore v. White, 528 U.S. 23 (1999) 24

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 24

Hopwood v. Texas, 21 F.3d 603 (5th Cir. 1994) 21

Jones v. Duke Power Co., 501 F. Supp. 713 (W.D.N.C. 1980), *aff'd*, 672 F.2d 910 (4th Cir. 1981) 3

Kansas v. Colorado, 185 U.S. 125 (1902) 29

Keith v. Daley, 764 F.2d 1265 (7th Cir. 1985) 27

Kentucky v. Indiana, 281 U.S. 163 (1930) 18, 30, 32

Lincoln Prop. Co. v. Roche, 546 U.S. 81 (2005) 31

Maine v. Director, U.S. Fish & Wildlife Serv., 262 F.3d 13 (1st Cir. 2001) 27

Martin v. Thornburg, 359 S.E.2d 472 (N.C. 1987) 39

Maryland v. Louisiana, 451 U.S. 725 (1981) 34, 35, 36, 37

Missouri v. Fiske, 290 U.S. 18 (1933) 18

Missouri v. Illinois, 180 U.S. 208 (1901) 39

Nebraska v. Wyoming:

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296 U.S. 548 (1935) 23

325 U.S. 589 (1945) 43

507 U.S. 584 (1993) 22

515 U.S. 1 (1995) 20, 21, 22, 27, 35, 40, 44

New Jersey v. New York, 345 U.S. 369 (1953) 13, 14, 17, 18, 19, 20, 21, 25, 26, 27, 28, 31-32, 35, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

Oklahoma v. Texas:

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258 U.S. 574 (1922) 33

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 18

San Juan County v. United States, 503 F.3d 1163 (10th Cir. 2007) 27

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 101 F.3d 503 (7th Cir. 1996) 27

State ex rel. Condon v. Hodges, 562 S.E.2d 623 (S.C. 2002) 39

Texas v. Louisiana, 426 U.S. 465 (1976) 32, 33

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 44

Town of Grimesland v. City of Washington, 66 S.E.2d 794 (N.C. 1951) 40

Trbovich v. United Mine Workers, 404 U.S. 528 (1972) 35

United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968 (2d Cir. 1984) 21

United States v. Nevada, 412 U.S. 534 (1973) 17, 22, 25, 38

Utah v. United States, 394 U.S. 89 (1969) 18, 31, 33

Wyoming v. Colorado:

259 U.S. 419 (1922) 42

286 U.S. 494 (1932) 29

ADMINISTRATIVE DECISIONS

PacifiCorp, 105 FERC ¶ 62,207 (2003), *clarified on reh'g*, 106 FERC ¶ 61,307 (2004) 51

Virginia Electric Power Company d/b/a Dominion Virginia Power/Dominion North Carolina Power, 110 FERC ¶ 61,241 (2005) 51

CONSTITUTION, STATUTES, AND RULES

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28 U.S.C. § 1251(a) 2

28 U.S.C. § 1257(a) 24

N.C. Gen. Stat. Ann. § 143-215.22L 6

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JUDICIAL MATERIALS

Brief for the United States in Opp., *Alaska v. United States*, No. 128, Orig. (U.S. filed Apr. 2001), *available at* http://www.usdoj.gov/osg/briefs/2003/1original/8.Original.resp.html 23

First Interim Report, *Nebraska v. Wyoming*, No. 108, Orig. (June 14, 1989) 22, 23, 35, 36, 37, 40, 55

Memorandum in Support of Motion of Basic Electric Power Cooperative for Leave To Intervene, *Nebraska v. Wyoming*, No. 108, Orig. (U.S. filed Apr. 13, 1987) 10

Motion of Columbia Gas Transmission Corp. *et al.* for Leave To Intervene as Plaintiffs and To File Complaint, *Maryland v. Louisiana*, No. 83, Orig. (U.S. filed Aug. 28, 1979) 35

Motion of Platte Valley Public Power & Irrigation District for Leave To Intervene and Petition in Intervention, *Nebraska v. Wyoming*, No. 13, Orig. (U.S. filed Oct. 19, 1935) 23

Motion on Behalf of Sidney Kartus *et al.* for Leave To File Petition To Intervene, *Arizona v. California*, No. 10, Orig. (U.S. filed Feb. 10, 1953) 23

Petition for an Order Enforcing Decree and for Injunctive Relief, *Nebraska v. Wyoming*, No. 108, Orig. (U.S. filed Oct. 7, 1986) 40

Report of Special Master, *Maryland v. Louisiana*, No. 83, Orig. (May 14, 1980) 35, 36, 38

Report of Special Master, *Texas v. Louisiana*, No. 36, Orig. (Mar. 15, 1975) 33

Report of the Special Master, *Alaska v. United States*, No. 128, Orig. (Nov. 27, 2001).....23, 54

Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 9, 1992) 37, 55

ADMINISTRATIVE MATERIALS

Catawba-Wateree Drought Management Advisory Group, 2009 News Releases, *available at* http://www.duke-energy.com/lakes/cw-dmag-news-&-info.asp 4

Duke Energy Application for New License, Catawba-Wateree Project (FERC No. 2232) (FERC filed Aug. 29, 2006) 52

Federal Energy Regulatory Commission, Notice of Authorization for Continued Project Operation, Project No. 2232-522 (Sept. 18, 2008) 9

North Carolina Department of Environment and Natural Resources, Division of Water Resources, "Drought Monitoring," *at* http://www.ncwater.org/Drought_Monitoring/ 4-5

South Carolina Department of Natural Resources, South Carolina State Climatology Office, "South Carolina Current Drought Status," *at* http://www.dnr.sc.gov/climate/sco/Drought/drought_current_info.php 4

South Carolina Water Resources Commission, Class I Interbasin Transfer Permit No. 29 WS01 S02 (May 8, 1989) 9

OTHER MATERIALS

American Rivers, *America's Most Endangered Rivers* (2008 ed.), *available at* http://www.americanrivers.org/site/DocServer/MER_Report2008opt.pdf?docID=7681 1

4 Robert E. Beck *et al.*, *Waters and Water Rights* (1991 ed., 2004 replace. vol.) 29

Eugene Gressman *et al.*, *Supreme Court Practice* (9th ed. 2007) 24

The Federalist No. 81 (Alexander Hamilton) 17

7C Charles A. Wright *et al.*, *Federal Practice and Procedure* (3d ed. 2007) 21

GLOSSARY

Charlotte Mot.	Motion for Leave To Intervene of the City of Charlotte, North Carolina, and Brief in Support of Motion, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Feb. 13, 2008)
CMO No. 8	Case Management Order No. 8, *South Carolina v. North Carolina*, No. 138, Orig. (Sept. 24, 2008)
Compl.	Complaint, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed June 7, 2007)
Compl. App.	Appendix to Complaint, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed June 7, 2007)
Compl. Mot. Br.	Brief of the State of South Carolina in Support of Its Motion for Leave To File Complaint, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed June 7, 2007)
Compl. Mot. Reply	Reply Brief of the State of South Carolina in Support of Its Motion for Leave To File Complaint, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Aug. 22, 2007)
CRA	Comprehensive Relicensing Agreement

CRWSP	Catawba River Water Supply Project
CRWSP Letter Br.	Letter from Thomas C. Goldstein to William K. Suter, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Dec. 8, 2008)
CRWSP Mot.	Motion of the Catawba River Water Supply Project for Leave To Intervene and Brief in Support of the Motion, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Nov. 30, 2007)
Duke or Duke Energy	Duke Energy Carolinas, LLC
Duke Answer	Answer of Duke Energy Carolinas, LLC's, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Nov. 30, 2007) (attached to Duke Mot.)
Duke Clarify/ Reconsider Opp.	Duke Energy's Brief in Opposition to Motion To Clarify or Reconsider, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed July 10, 2008)
Duke Mot.	Duke Energy Carolinas, LLC's Motion and Brief in Support of Motion To Intervene and File Answer, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Nov. 30, 2007)

Duke Reply	Duke Energy Carolinas, LLC's Reply Brief in Support of Motion To Intervene and File Answer, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Dec. 19, 2007)
FERC	Federal Energy Regulatory Commission
IBT	interbasin transfer
LCWSD	Lancaster County Water and Sewer District
LIP	Low Inflow Protocol
mgd	million gallons per day
NC Answer	Answer to Bill of Complaint, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Nov. 30, 2007)
NC App.	Appendix to Brief of the State of North Carolina in Opposition, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Aug. 7, 2007)
NC Charlotte Resp.	Brief of the State of North Carolina in Response to the City of Charlotte's Motion for Leave To Intervene and File Answer, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Feb. 22, 2008)

NC Opp.	Brief of the State of North Carolina in Opposition, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Aug. 7, 2007)
No. 83 Report	Report of Special Master, *Maryland v. Louisiana*, No. 83, Orig. (May 14, 1980)
No. 108 First Report	First Interim Report, *Nebraska v. Wyoming*, No. 108, Orig. (June 14, 1989)
No. 108 Second Report	Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 9, 1992)
No. 128 Report	Report of the Special Master, *Alaska v. United States*, No. 128, Orig. (Nov. 27, 2001)
Recommendation	Order Granting Motions for Leave to Intervene of the City of Charlotte, North Carolina, Catawba River Water Supply Project, and Duke Energy Carolinas, LLC, *South Carolina v. North Carolina*, No. 138, Orig. (May 27, 2008)
Report	First Interim Report of the Special Master, *South Carolina v. North Carolina*, No. 138, Orig. (Nov. 25, 2008)

SC Charlotte Opp.	Brief of the State of South Carolina in Opposition to Motion for Leave To Intervene of the City of Charlotte, North Carolina, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Feb. 25, 2008)
SC Clarify/ Reconsider Mot.	Motion of South Carolina for Clarification or, in the Alternative, for Reconsideration of the May 27, 2008 Order Granting Limited Intervention, *South Carolina v. North Carolina*, No. 138, Orig. (June 27, 2008)
SC CRWSP Opp.	Brief of the State of South Carolina in Opposition to Motion of the Catawba River Water Supply Project for Leave To Intervene, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Dec. 13, 2007)
SC Duke Opp.	Brief of the State of South Carolina in Opposition to Duke Energy Carolinas, LLC's Motion for Leave To Intervene and File Answer, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Dec. 11, 2007)

INTRODUCTION

The Catawba River, which originates in North Carolina and flows to South Carolina, has been designated America's Most Endangered River.[1] In this original action, South Carolina seeks an equitable apportionment with North Carolina of the River, so that South Carolina gets its fair share of the River's waters.

The intrastate apportionment of each State's equitable share of the water among municipal or private users within either State is beyond the scope of this action. Yet the Special Master has recommended permitting three non-state entities to intervene with rights of full parties. The putative intervenors seek to transform an equitable apportionment action between two sovereign States into an intramural dispute over the intervenors' competing interests. This Court's longstanding precedent, however, presumes that States act as *parens patriae* in representing the interests of *all* citizens of the State; that this Court's original jurisdiction is not used to resolve intrastate disputes between private persons or political subdivisions within States; and that the standards for intervening in original actions are stringent to avoid transforming such suits into the kinds of actions heard routinely by state and federal courts. Because the Special Master's First Interim Report ("Report") is not true to this Court's precedents limiting when non-state entities may intervene in an original action between States, South Carolina's exceptions should be sustained.

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[1] *See* American Rivers, *America's Most Endangered Rivers* (2008 ed.), *available at* http://www.americanrivers.org/site/DocServer/MER_Report2008opt.pdf?docID=7681

JURISDICTION

On October 1, 2007, the Court granted South Carolina's motion for leave to file its Complaint against North Carolina. The Court's jurisdiction over this controversy between two States is both original and exclusive. *See* U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a).

The Court referred three motions for leave to intervene to the Special Master. On November 25, 2008, the Special Master issued her Report recommending that the motions for leave to intervene be granted. On January 9, 2009, the Court granted South Carolina's motion for leave to file exceptions to the Report.

STATEMENT

A. The Catawba River Is Subject To Extended Periods Of Inadequate Flow

The Catawba River originates in the mountains of western North Carolina and flows east and then south into South Carolina, where it serves citizens of the Catawba River Basin (including portions of eight South Carolina counties). The Basin is the fastest growing sub-region in the Carolinas and is expected to see significant growth over the next decade. It is home to nearly 300,000 people in South Carolina alone, and in North Carolina includes portions of the Charlotte metropolitan area, the largest population center in the Carolinas. *See* Compl. ¶ 10; Compl. App. 37.

The availability of Catawba River water is essential to the economic development of the portions of South Carolina it serves. The River provides drinking water for and receives waste discharges from eight counties in South Carolina. It also supports a

number of major industries that employ thousands of people in the Basin. In addition, the River supports other uses, including hydroelectric and thermoelectric power generation, irrigation, aquaculture, recreation, and valuable wildlife habitat.

Although the Carolinas rely heavily on the Catawba River for water, its volume naturally fluctuates and is periodically too low to serve the needs of both States, especially during times of drought. This extreme variation in water flow has been recorded for more than 200 years. In the late eighteenth century, "severe periodic fluctuations in water level" and "inadequate water volume at ordinary stages" prevented efforts to improve the River for navigation. *Jones v. Duke Power Co.*, 501 F. Supp. 713, 717 (W.D.N.C. 1980), *aff'd*, 672 F.2d 910 (4th Cir. 1981). In recent years, the periodic decreases in river flow — and the accompanying inadequacy of available water — have become dramatically more frequent and severe. At the same time, population growth and water use in the Catawba River Basin have expanded and will continue to increase substantially, placing increasing demands on a resource that is already critically low for extended periods. North Carolina projects that its own consumption will more than double over the next 50 years. *See* NC App. 9a (Aug. 7, 2007).

In the last half century, South Carolina has experienced at least eight major droughts — including severe and extended droughts during the mid-1950s, the late 1980s, and from 1998 through 2002. *See* Compl. App. 15; NC Answer 10 (Nov. 30, 2007). A fourth drought has followed in recent years. During each of these multi-year droughts, water flow has decreased to levels inadequate to support existing

demands on the Catawba River. Drought effects that began in 1998 were particularly severe and harmful to South Carolina's citizens. Low water levels forced closure of major boat landings and public access areas, harming both the public and the businesses that depend on the lakes formed by damming the River. *See* Compl. App. 23, 38. Tap water was undrinkable in the City of Camden, South Carolina. *See id.* at 38. Drought also caused Duke Energy (among the proposed intervenors here) to reduce significantly the generation of electricity from its hydroelectric stations located on the River. *See id.* Other businesses incurred substantial costs as well. The Bowater pulp and paper mill, for instance, paid more than $6,000 per day because the decreased water flow was insufficient to assimilate its treated wastewater consistent with state permits. *See id.* at 32-33, 38-39. Indeed, the flow in major tributaries of the River fell to the point that the only water flowing was from wastewater treatment plant discharges. *See id.* at 39.

Both States continue to experience extreme drought conditions, with river stream flows often running less than half of their historical averages.[2] Reports from the respective State climatology offices indicate that all counties in the Catawba River Basin have frequently experienced "severe," "extreme," and/or "exceptional" drought conditions in recent years.[3]

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[2] *See, e.g.*, Catawba-Wateree Drought Management Advisory Group, 2009 News Releases, *available at* http://www.duke-energy.com/lakes/cw-dmag-news-&-info.asp.

[3] South Carolina Department of Natural Resources, South Carolina State Climatology Office, "South Carolina Current Drought Status," *at* http://www.dnr.sc.gov/climate/sco/Drought/drought_current_info.php (visited Feb. 11, 2009); North Carolina

Moreover, droughts and periods of reduced flow are becoming the norm, rather than the exception. As part of its application to the Federal Energy Regulatory Commission ("FERC") to renew its license to operate 11 hydroelectric projects on the Catawba River, Duke Energy and other stakeholders developed a model gauging river flow. Using that model, Duke projected that, over the next 50 years (the requested term of its license), the River would experience the most severe shortages — referred to as Stage 3 of the "Low Inflow Protocol" ("LIP") — for a total of only four of the 600 months of the license term (0.67% of the projected time period). Yet before Duke's license application has even been approved, the River has already suffered Stage 3 conditions for 15 consecutive months (2.5% of the projected time period), from October 2007 to January 2009. Thus, actual data show a nearly four-fold increase in such low flows over projected data.

B. The Interstate Dispute

Recognizing the need for a framework between the two States to protect each State's equal rights in the Catawba River, South Carolina proposed negotiations for an interstate compact between the States. *See* U.S. Const. art. I, § 10. When North Carolina rejected that entreaty, South Carolina filed a motion before this Court for leave to file its Complaint.

The Complaint alleges that North Carolina, as the upstream State, has unilaterally taken more than its fair share of river water during times of low flow and seeks a decree "equitably apportioning the Catawba

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Department of Environment and Natural Resources, Division of Water Resources, "Drought Monitoring," *at* http://www.ncwater.org/Drought_Monitoring/ (visited Feb. 11, 2009).

River" between the two States. Compl., Prayer for Relief ¶ 1. As the most obvious examples of North Carolina's over-consumption, the Complaint points to North Carolina's authorization, pursuant to a state statute, of a series of large interbasin transfers ("IBTs") of water from the River Basin, totaling at least 72 million gallons per day ("mgd") (plus any transfers under 2 mgd, which do not require a permit). *See* Compl. ¶¶ 18-19. The Complaint alleges that North Carolina has made these transfers without regard to their effects in South Carolina and to South Carolina's entitlement to an equitable share of river water. North Carolina permits these transfers without restrictions or limitations to protect South Carolina's interests when the River's flow is critically low. *See id.*; *see also* N.C. Gen. Stat. Ann. § 143-215.22L.[4] The Complaint does not request, however, that any particular transfer be restrained, which is an *intra*state matter for North Carolina to determine consistent with its equitable share of the River. Rather, the Complaint "encompasses a general request for an equitable apportionment of the Catawba River" and "requires consideration of a broader set of factors than the interbasin transfers." Case Management Order No. 8, at 1, 4 (Sept. 24, 2008) ("CMO No. 8").[5]

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[4] This 2007 replacement statute changed the method by which North Carolina permits IBTs, but did nothing to protect South Carolina's equitable rights in the Catawba River. As the Special Master concluded, those "changes do not appear to be material for purposes of the present Report." Report at 5 n.2.

[5] Orders and pleadings filed by or with the Special Master are posted on the Special Master's website at http://www.mto.com/sm.

North Carolina opposed South Carolina's motion for leave to file its Complaint on the principal ground that the FERC proceedings on Duke's relicensing application could "substantially resolve the matters in dispute," to the extent that Duke's relicensing application included an increased minimum-flow requirement for water passing into South Carolina. NC Opp. 15 (Aug. 7, 2007). South Carolina responded that the scope of the FERC proceedings was limited to determining "whether and under what conditions Duke Energy should be granted a new license to continue the operation of its hydroelectric plants," noting that even North Carolina conceded that the procedures for handling periods of low flow in Duke's proposed license (also referred to as the Comprehensive Relicensing Agreement or "CRA") "affect[] only how Duke Energy uses the water in the river, not other users or stakeholders in the re-licensing process." Compl. Mot. Reply 4-5 (Aug. 22, 2007). In any event, South Carolina added, "although Duke Energy can control the Lake Wylie dam" where the Catawba River crosses the border into South Carolina, Duke "has no authority to determine the volume of water . . . withdrawn . . . above that point." *Id.* at 6. When less water flows through the Catawba River system, Duke has less water to release from the Lake Wylie dam. *See id.*

C. The Proposed Intervenors

Three non-state entities — the City of Charlotte, North Carolina ("Charlotte"), the Catawba River Water Supply Project ("CRWSP"), and Duke Energy Carolinas, LLC ("Duke") — each seek leave to intervene as party defendants on North Carolina's side.

1. Charlotte avers that a "primary target[]" of South Carolina's Complaint was Charlotte-

Mecklenburg Utilities' authorization under North Carolina law to transfer up to 33 mgd from the Catawba River Basin. Charlotte Mot. 2, 12 (Feb. 13, 2008). Charlotte argues that North Carolina does not adequately represent its interests because North Carolina "must represent the interests of all water users in the State along the Catawba River," whereas Charlotte will focus "exclusively" on its own interests as a water user within the State. *Id.* at 17-18.

South Carolina opposes Charlotte's motion, because the volume of Charlotte's consumption does not set it apart from other water users in the State and Charlotte's interests are adequately represented by North Carolina. North Carolina takes no position on Charlotte's motion, although it specifically disputes Charlotte's assertion that North Carolina will not adequately represent Charlotte's interests. *See* NC Charlotte Resp. 2 (Feb. 22, 2008) ("The State cannot agree . . . [that] it cannot, or will not represent the interests of Charlotte in this litigation initiated by South Carolina."). Indeed, North Carolina affirmatively states that it will fully represent Charlotte's interests. *See id.*

2. CRWSP is a joint venture between two political subdivisions, one in North Carolina (Union County) and one in South Carolina (Lancaster County Water and Sewer District ("LCWSD")). Union County is authorized under North Carolina law to transfer up to 5 mgd from the Catawba River Basin. LCWSD is a "special purpose district" organized under South Carolina law to serve the citizens of Lancaster County. LCWSD has a permit from South Carolina's Department of Health and Environmental Control to transfer up to 20 mgd from the Basin, but subject to appropriate limitations during periods of low flow

See South Carolina Water Resources Commission, Class I Interbasin Transfer Permit No. 29 WS01 S02 (May 8, 1989) (requiring minimum flow of 1,200 cubic feet per second as a condition of transfer). In total, CRWSP is permitted to withdraw 36 mgd out of the Basin, although pursuant to the North Carolina permit only 5 mgd may be transferred for use outside of the Basin. *See* CRWSP Mot. 4 (Nov. 30, 2007). The CRWSP plant and point of withdrawal is in Lancaster County, South Carolina. CRWSP thus withdraws water on the South Carolina side of the boundary and transfers it for use on the North Carolina side.[6]

3. Duke was initially created to generate power for the cotton mills operating in the Catawba River Basin. *See* Compl. Mot. Br. 3 (June 7, 2007). It now owns and operates a system of 11 reservoirs in both States that provide hydroelectric power to the region, pursuant to its 50-year license issued in 1958 by the Federal Power Commission, the predecessor to FERC. In advance of its application for relicensing before FERC, Duke initiated a multi-stakeholder negotiation process that ultimately yielded the CRA, which Duke submitted as part of its application. That application remains pending before FERC.[7]

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[6] South Carolina opposes CRWSP's motion, arguing that "[t]he municipalities composing [CRWSP] represent only a discrete subset of interests in either State," which "compete within their respective States, for allocation of water *from* each State." SC CRWSP Opp. 4 (Dec. 13, 2007).

[7] FERC has extended Duke's license on an annual basis pending a final determination on its relicensing application. *See* Federal Energy Regulatory Commission, Notice of Authorization for Continued Project Operation, Project No. 2232-522 (Sept. 18, 2008).

Duke asserts three grounds for its intervention. First, Duke argues that it should be permitted to intervene because of its role in controlling the Catawba River's flow through operation of the dams and reservoirs that make up its hydroelectric system. Second, Duke claims a "unique interest" in defending the conditions set forth in the CRA, as well as the terms of its current and (potential) future licenses. Duke Mot. 3 (Nov. 30, 2007). Duke contends (in the absence of the United States or FERC in this action) that it can provide an "essential" link to the ongoing licensing proceedings before FERC, Duke Reply 17 (Dec. 19, 2007), which Duke believes is necessary to avoid the potential for conflicting obligations arising from the two proceedings. Third, Duke asserts state-law rights in North Carolina to "protect Duke's riparian interests in the Catawba River flow and its interests in the excess water created by Duke's impoundments." Duke Answer 5, Prayer for Relief ¶ 2 (attached to Duke Mot.).

South Carolina opposes Duke's motion, because to the extent Duke seeks to intervene to protect its own water uses granted under state law, those interests are insufficient to support intervention under the Court's precedents and are in any event adequately represented by the party States. To the extent Duke seeks to intervene to protect what it terms "federal public interests," South Carolina contends that a private licensee has no authority to intervene to, in effect, represent the United States. *See* SC Duke Opp. 4-5 (Dec. 11, 2007). Moreover, South Carolina maintains that, even absent a decision by the United States or FERC to join these proceedings, this Court is capable of taking notice of and giving due regard to those public proceedings. *See id.* at 6-7.

D. The Special Master's Initial Decision And South Carolina's Motion For Clarification Or Reconsideration

On May 27, 2008, the Special Master issued a recommendation[8] that the Court allow all three entities to intervene for the "limited purpose" of arguing against any final decree that would affect either their "unique interest" or "direct stake" in existing state authorizations to transfer water out of the Catawba River Basin, or, in the case of Duke, its "unique and compelling interest" in its existing federal license and application for license renewal now pending before FERC. Recommendation at 8-12. Finding that each proposed intervenor has a "direct stake" in this action, the Special Master did not specifically consider whether proposed intervenors' interests were adequately represented by the party States. Rather, the Recommendation posits that the Court's precedents do not require a potential intervenor to show that the State is "incapable of representing the proposed intervenor's interests, such as because their interests are in conflict." *Id.* at 8-9.[9]

On June 27, 2008, South Carolina moved for clarification of the Special Master's recommendation. South Carolina understood the Special Master's recommended grant of intervention for "limited purposes"

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[8] *See* Order Granting Motions for Leave to Intervene of the City of Charlotte, North Carolina, Catawba River Water Supply Project, and Duke Energy Carolinas, LLC (May 27, 2008) ("Recommendation").

[9] The Special Master, however, rejected both CRWSP's argument that it was entitled to intervene based on its bi-state status and Duke's argument that it should be admitted to protect "federal" "public interests" under its current and pending licenses. *See* Recommendation at 10-11, 12.

necessarily to deny putative intervenors full party status in "Phase One" of the litigation, which the party States had agreed would address the threshold question whether South Carolina has sustained harm from North Carolina's consumptive uses, including interbasin transfers of water from the Catawba River. Thus, consideration of proposed intervenors' interests could be deferred until Phase Two, which has been designed to address remedy. Proposed intervenors took the position that the Special Master's recommendation granted them full party status in all phases of the litigation, including propounding their own written discovery, participating in depositions, filing their own expert reports on the threshold question of South Carolina's injuries, and filing motions and other briefs on all aspects of the litigation. In the alternative, South Carolina moved for reconsideration in the event the Special Master agreed with proposed intervenors' reading of the Recommendation. *See* SC Clarify/Reconsider Mot. (June 27, 2008).

In a July 17, 2008 telephonic conference, the Special Master denied South Carolina's motion for clarification or reconsideration. South Carolina requested that the Special Master's rulings be memorialized in an Interim Report for this Court's review.

E. The Special Master's First Interim Report

On November 25, 2008, the Special Master issued the Report, recommending that the Court grant the motions to intervene, with proposed intervenors permitted to participate fully in all aspects of the lawsuit. The Report concludes that it is not necessary for an intervenor to demonstrate that its State fails adequately to represent its interests, and accordingly that each of the three non-state entities has an individual interest sufficiently compelling and

concrete to warrant intervention. The Report seeks to "distill[]" a uniform rule governing the presence of non-state entities as defendants in original actions. Report at 20. Under that distillation, a non-state entity may intervene in an original action when it is "authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief," where it has a "property interest" directly implicated by the States' dispute, where the entity "otherwise has a 'direct stake' in the outcome of the action within the meaning of the Court's cases," or where, "together with one or more of the above circumstances, the presence of the non-state entity would advance the 'full exposition' of the issues." *Id.* at 20-21.

Applying that standard to Charlotte and CRWSP, the Report concludes that each has an interest in defending North Carolina's IBT regime and the existing authorizations granted thereunder against any adverse disposition by the Court. *See id.* at 25. It further reasons that Charlotte and CRWSP are not mere water users, but rather effectuate the "'actual diversion of water'" that South Carolina challenges. *Id.* at 26 (quoting *New Jersey v. New York*, 345 U.S. 369, 371-72 (1953) (per curiam)).

The Report concedes that Duke is neither "the immediate target" of South Carolina's Complaint nor an "authorized agent" of South Carolina's injury. *Id.* at 28. It nonetheless finds that Duke has an interest in preserving its existing reservoir operations and the negotiated outcome set out in both the CRA and Duke's pending license application. *See id.*

The Report does not, however, address whether any of the three proposed intervenors have demon-

strated that their interests would not be adequately represented by North Carolina.[10]

SUMMARY OF ARGUMENT

I. In original actions, the Court requires a potential intervenor to demonstrate (1) a "compelling interest in [its] own right," (2) "apart from [its] interest in a class with all other citizens and creatures of the state," (3) "which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam). That stringent test is rooted in state sovereignty and the *parens patriae* doctrine, under which the Court deems party States to represent all of their citizens. It also accords with sound principles of judicial administration because the Court exercises its original jurisdiction sparingly. *See id.* at 372-73. In applying the test in equitable apportionment actions, which necessarily involve the States' sovereignty over the multitude of interests by users of river waters, this Court has never approved intervention by non-state entities. Such cases concern the federal law of apportionment of water *between* States, not the state-law questions of how water is allocated among competing interests *within* the State.

The Report disregards the Court's test, first, by failing to require a would-be intervenor to show that no party State adequately represents its interests. Instead, it offers a novel test in recommending that

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[10] The Report also recommends denial of South Carolina's motion for clarification or reconsideration. The Report concludes that, because proposed intervenors "have an interest in the liability proceedings that could lead to [an] adverse result — including, for example, the question whether South Carolina has suffered harm as a result of particular interbasin transfers within the State of North Carolina," Report at 34, they should be permitted to participate in all phases of the proceedings.

three entities each have "compelling interests" to justify their intervention in this original action. The Report's unprecedented test functionally nullifies the *parens patriae* doctrine, opening the door to widespread intervention in original actions generally, while transforming equitable apportionment suits between sovereign States into forums for litigating intrastate water disputes in this Court.

The Report's primary error in disregarding the Court's adequate-representation requirement is reason enough to reject the novel test it adopts. But the Report compounds that error with the additional conclusions that intervention is proper whenever the movant (1) is the "instrumentality" authorized to engage in conduct alleged to harm the plaintiff State, (2) has an "independent property interest" at issue in the action, or (3) otherwise has a "direct stake" in the outcome of the action. Report at 20-21. Each of those recommended bases for intervention rests on a misreading of the relevant Court precedent. The Court has stringently guarded its original jurisdiction generally, and in equitable apportionment actions particularly, on the ground that water users within a State — whether large or small, municipal or industrial — are situated no differently from other water users and all such interests are properly represented by the State.

II. Under the correct legal standard, none of the proposed intervenors is entitled to intervene. North Carolina defends the existing interbasin transfers it has authorized under state law, including those by Charlotte and CRWSP. Moreover, Charlotte and CRWSP — in seeking to protect their individual transfers from any reduction resulting from an equitable apportionment that reduces North Carolina's

overall share of the Catawba River — invite the Court to take up precisely the kind of intramural dispute the Court typically refuses to entertain.

Duke's interests in controlling its reservoir operations and in the river flows proposed in its pending application for relicensing before FERC are merely derivative of its interests as a water user. North Carolina fully represents those interests, in particular by asserting that South Carolina's claims should be resolved based on the minimum river flows in the CRA that Duke submitted to FERC. In addition, any "conflict" between this action and any license FERC grants Duke in the future is purely hypothetical at this stage, given that Duke's application to FERC expressly disclaims resolution of the disputed water consumption issues that are the subject of this action. Nor does Duke's knowledge of relevant facts or involvement in pertinent events entitle it to intervene as a full party with rights to elicit facts through discovery from the party States, when such facts are readily obtained through the subpoena process and Duke's participation as an *amicus curiae*.

ARGUMENT

I. THE SPECIAL MASTER FAILED TO APPLY THE CORRECT LEGAL STANDARD FOR INTERVENTION

A. The Test For Intervention In Original Actions Is Stringent

This Court has consistently guarded its original jurisdiction, which applies only to cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." U.S. Const. art. III, § 2, cl. 2. Original equitable apportionment actions such as this one are reserved for adjudicating disputes *between States* and not entities within those States, because, in part, the Court "seek[s] to exercise [its] original jurisdiction sparingly." *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam) (denying intervention even where movants satisfied standard for intervention under Federal Rules of Civil Procedure). The Court's exercise of its original jurisdiction is thus founded on the notion that, "[i]n cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal." The Federalist No. 81 (Alexander Hamilton). The Framers' policy concern for original jurisdiction in this Court over suits between States is not served by permitting non-state intervenor parties to exert influence over litigation through their advocacy of parochial interests except in the most compelling of circumstances.

Accordingly, the Court requires a potential intervenor to demonstrate (1) a "compelling interest in [its] own right," (2) "apart from [its] interest in a class with all other citizens and creatures of the state," (3) "which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373.

That stringent standard is based on the "'*parens patriae*' doctrine," which reflects "the principle that the state, when a party to a suit involving a matter of sovereign interest, '*must* be deemed to represent all its citizens.'" *Id.* at 372 (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930)) (emphasis added). The standard is a "necessary recognition of sovereign dignity, as well as a working rule for good judicial administration." *Id.* at 373. The Court's strict test ensures that its "original jurisdiction" is not "expanded to the dimensions of ordinary class actions." *Id.*; *cf. Utah v. United States*, 394 U.S. 89, 95-96 (1969) (per curiam) (finding "substantial reasons for denying intervention" where admitting one party "would require the admission of any of the other 120 private landowners who wish to quiet their title to portions of the . . . lands [at issue], greatly increasing the complexity of this litigation"). And it protects the Court from, "in effect, be[ing] drawn into an intramural dispute over the distribution of water within [a State]." *New Jersey v. New York*, 345 U.S. at 373. Were it "[o]therwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.*[11]

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[11] A stringent test for intervention also avoids Eleventh Amendment issues that would arise were the intervenors to assert claims or seek relief directly against the State. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984) (Eleventh Amendment necessarily "embraces demands for the enforcement of equitable rights") (internal quotation marks omitted); *Missouri v. Fiske*, 290 U.S. 18, 27 (1933) (Eleventh Amendment precludes "demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a state"). South Carolina reserves the right to argue that the

New Jersey v. New York, the leading case on intervention both generally and in the specific equitable apportionment context implicated here, "demonstrates the wisdom of th[is] rule." *Id.* Three party States (New Jersey, New York, and Pennsylvania) disputed the proper apportionment of the Delaware River. (The Court had earlier permitted Pennsylvania to intervene over vigorous opposition to "protect the rights and interests of Philadelphia and Eastern Pennsylvania." *Id.* at 374.) The City of Philadelphia subsequently moved to intervene because the equitable apportionment decree could interfere with Pennsylvania's state-law authorization — provided for in a recently granted "Home Rule Charter" — to manage Philadelphia's "own water system." *Id.*

After setting forth its three-part test for an "intervenor whose state is already a party," the Court found that "Philadelphia has not met [its] burden and . . . leave to intervene must be denied." *Id.* at 373-74. The Court explained that Pennsylvania was admitted to the litigation "to protect the rights and interests of Philadelphia and Eastern Pennsylvania in the Delaware River" and that its support of those rights and interests "remain[ed] vigorous and unchanged." *Id.* at 374. In light of Pennsylvania's opposition to any "diversion not justified under the doctrine of equitable apportionment," Philadelphia was "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests." *Id.* Although the Home Rule Charter made Philadelphia "responsible for her own water system," the Court found "that responsibility [to be] *invariably* served

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Eleventh Amendment bars any particular form of relief that may be sought in this suit by proposed intervenors.

by the Commonwealth's position." *Id.* (emphasis added).

The Court also addressed Philadelphia's contention that intervention was warranted because it was a very large water user representing "about half" of the Pennsylvania citizens within the relevant watershed. *Id.* at 373 n.*. The Court stressed that "Philadelphia represent[ed] only a part of the citizens of Pennsylvania who reside in the watershed." *Id.* at 373. If Philadelphia could intervene, then presumably so could other Pennsylvania "cities along the Delaware River . . . which like Philadelphia, are responsible for their own water systems." *Id.* Nor could the Court perceive "any assurance that the list of intervenors could be closed with political subdivisions of the states. Large industrial plants which, like cities, are corporate creatures of the state may represent interests just as substantial." *Id.* Thus, the Court indicated that even very large water users can rarely, if ever, make the required showing for intervention because an intramural dispute over how to allocate water within a State is not sufficiently compelling or unique under the Court's test. *See id.* at 375 (denying Philadelphia's motion for leave to intervene).

The Court reaffirmed these principles in *Nebraska v. Wyoming*, 515 U.S. 1 (1995), in which Wyoming sought to assert a cross-claim against the United States alleging failure to manage federal storage-water reservoirs in violation of a prior decree apportioning the North Platte River. *See id.* at 15. The United States opposed Wyoming's motion for leave to add that claim, raising the "specter" that the cross-claim would open the door for "intervention by many individual" holders of storage-water contracts. *Id.* at 21. The Court allowed Wyoming to add its cross-

claim, rejecting the United States' concern that doing so would invite intervention motions by non-state entities with the explanation that such individual contractors would not have a basis for intervening. Because a "State is presumed to speak in the best interests of those citizens," the contractors would be "unlikely" to "show that their proprietary interests are not adequately represented by their State." *Id.* at 21-22.[12] Those principles have been invoked routinely to deny intervention to other non-state entities.

B. The General Rule Against Intervention In Original Actions Is Particularly Strong In Equitable Apportionment Cases

Although the Court has rarely permitted intervention in an original action of any sort, it has never permitted intervention by non-sovereign water users in an action to apportion equitably an interstate river between States. Both before and after its 1953 decision in *New Jersey v. New York*, the Court (with the recommendations of its Special Masters) has denied all such requests. The Court has explained that

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[12] Even under the Federal Rules of Civil Procedure's more permissive standards for intervention, courts will presume, "in the absence of a very compelling showing to the contrary [that] . . . a state . . . adequately represent[s] the interests of its citizens." 7C Charles A. Wright *et al.*, *Federal Practice and Procedure* § 1909, at 414-22 (3d ed. 2007) (discussing the "adequate[] represent[ation]" standard in Rule 24(a)(2)); *see also Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994) (per curiam) ("[W]here the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required."); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984) (requiring "a strong affirmative showing that the sovereign is not fairly representing the interests of the applicant").

"individual users of water . . . ordinarily would have *no* right to intervene in an original action in this Court." *United States v. Nevada*, 412 U.S. at 538 (emphasis added). Indeed, the Court has "said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States." *Nebraska v. Wyoming*, 515 U.S. at 22.

In *Nebraska v. Wyoming*, 507 U.S. 584, 589-90 (1993), the Court "adopt[ed]" the Special Master's recommendation to deny motions of various water users to intervene in an interstate water dispute. Wyoming-based Basin Electric Power Cooperative sought to intervene on the side of that upstream State to defend itself against claims by Nebraska that the utility's activities in Wyoming violated a previous equitable apportionment decree entered by the Court in 1945. *See* First Interim Report at 1, 11, *Nebraska v. Wyoming*, No. 108, Orig. (June 14, 1989) ("No. 108 First Report"). The Special Master found that "Basin Electric had not shown a compelling interest in its own right that would not be properly represented by Wyoming," because both the State and the utility took the same position regarding the waters at issue. *Id.* at 11 n.22, 12 (internal quotation marks omitted). The Special Master thus "saw Basin's position as comparable to that of the City of Philadelphia in *New Jersey v. New York*." *Id.* at 12 n.23. The Special Master likewise rejected the argument that two utilities in Nebraska should be admitted as parties to protect their FERC licenses, finding that "issues concerning their status and re-

sponsibilities as FERC licensees would not be part of this proceeding." *Id.* at 14.[13]

This Court has permitted intervention by a non-state entity in only one equitable apportionment case, but there the proposed intervenors were sovereign Indian Tribes. *See Arizona v. California*, 460 U.S. 605 (1983). As the Court explained, "the Indians are entitled to take their place as independent qualified members of the modern body politic," and therefore "the Indians' participation in litigation critical to their welfare should not be discouraged." *Id.* at 615 (internal quotation marks omitted); *cf. Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 (1991) ("Indian tribes are sovereigns."). Because of their sovereign status, the Tribes did not have to show that the United States would inadequately represent their interests. *See Arizona v. California*, 460 U.S. at 615 n.5. The Court's historical treatment of sovereigns confirms the rule that non-sovereign entities must meet a more stringent test for intervention in

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[13] *See also* Report of the Special Master, *Alaska v. United States*, No. 128, Orig. (Nov. 27, 2001) ("No. 128 Report") (in an action to quiet title to submerged lands, denying motion to intervene as defendants by private parties with an alleged commercial interest in harvesting and selling fish in the disputed area); Brief for the United States in Opp. at 4, *Alaska v. United States*, No. 128, Orig. (U.S. filed Apr. 2001) (opposing intervention because a private party may intervene in an original action only in "compelling circumstances"). In earlier cases, the Court had summarily denied motions to intervene by non-state water users in original actions between States. *See, e.g., Arizona v. California*, 345 U.S. 944 (1953) (farmers and ranchers) (denying Motion on Behalf of Sidney Kartus *et al.*, No. 10, Orig. (U.S. filed Feb. 10, 1953)); *Nebraska v. Wyoming*, 296 U.S. 548 (1935) (hydroelectric power company and significant water user) (denying Motion of Platte Valley Public Power & Irrigation District, No. 13, Orig. (U.S. filed Oct. 19, 1935)).

an original action between States, which are presumed to represent adequately the interests of all their citizens.

Sound reasons support a strong presumption against intervention in equitable apportionment cases by a person whose State is already litigating as a party. Federal common law determines water rights as between States, not as between individuals within States. As the Court explained in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110. As between two States, the state-law rights of a "private appropriator" in either State "can rise no higher than those of [the party State], and an adjudication of the [State's] rights will necessarily bind him." *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). Although this Court routinely adjudges whether state law is preempted by federal law, it does not sit in review of the meaning of state law in its normal applications to parties.[14]

The Court applied those principles in *Hinderlider*, which held that "apportionment [by this Court] is binding upon the citizens of each State and all water claimants," even where the State had previously allocated state-law water rights among individual claimants. 304 U.S. at 106. To the extent non-state water claimants seek to protect their water rights vis-à-vis other water users in their own State, forums other

[14] *See, e.g., Fiore v. White*, 528 U.S. 23 (1999) (certifying state-law question to state supreme court); 28 U.S.C. § 1257(a); Eugene Gressman *et al., Supreme Court Practice* 141-45 (9th ed. 2007).

than original actions in this Court are available to resolve such intrastate water disputes. *See, e.g., United States v. Nevada*, 412 U.S. at 539-40 (intrastate water disputes can be settled in other courts). But to include intrastate users of water in federal-law apportionment disputes between States provides a forum for the in-state user both to advocate positions inconsistent with the State and to introduce intramural disputes into a litigation apportioning river water between two States. *See New Jersey v. New York*, 345 U.S. at 372-73.

C. The Report's Novel Approach To Intervention Is Inconsistent With This Court's Precedent

The Report develops a new legal standard "distilled" from both the Court's decisions on intervention and cases in which complaining States voluntarily named non-state entities as defendants. Report at 20. Under the Report's novel test, "non-state entities may become parties" in original actions between States

> [1] where the non-state entity is the instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief, [2] where the non-state entity has an independent property interest that is directly implicated by the original dispute or is a substantial factor in the dispute, [3] where the non-state entity otherwise has a "direct stake" in the outcome of the action within the meaning of the Court's cases discussed above, or [4] where, together with one or more of the above circumstances, the presence of the non-state entity would advance the "full exposition" of the issues.

Id. at 20-21.

Notably absent from that distillation is the Court's requirement that an "intervenor whose state is already a party" demonstrate concretely that its interest "is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373. In addition, each of the four prongs of the Report's test rests on a misreading of the relevant Court precedent, which has not adopted those factors as generally applicable in deciding intervention.

1. The Report's Approach Nullifies the Court's Adequate-Representation Requirement

In *New Jersey v. New York*, the Court explained that an intervenor has "the burden of showing" a "compelling interest" — one "apart from [an] interest" shared by others in the State — that "is not properly represented by the state." 345 U.S. at 373. Despite that clear precedent, the Report's test imposes no requirement that an intervenor identify any respect in which it is not adequately represented by the party States. The Report reasons that the Court did not "mean that there must be a conflict of interest or some other disabling factor that would prevent the party state from representing the proposed intervenor's interests." Report at 23.

But considerations of that type are precisely what the Court meant when it found that Philadelphia had "not met [its] burden" under the Court's test, so "leave to intervene must be denied." *New Jersey v. New York*, 345 U.S. at 373-74. The Court stressed that Philadelphia was "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests," which were "invariably served by the Commonwealth's position." *Id.* at 374. That

factor — dispositive in *New Jersey v. New York* — plays no role in the Report's test.

If *New Jersey v. New York* left any room for doubt on the importance of adequacy of representation in the intervention analysis, *Nebraska v. Wyoming* eliminated it. The Court permitted Wyoming to add a cross-claim, despite the "specter, raised by the United States, of intervention by many individual . . . contractors" if Wyoming's claim were added. 515 U.S. at 21; *see supra* pp. 20-21. The Court held that any "requests to intervene by individual contractees" would be "treated under" the three-part *New Jersey* test and that it was "unlikely" that individual contractees could "show that their proprietary interests are not adequately represented by their State." 515 U.S. at 21-22.[15]

By failing to impose on a proposed intervenor the heavy burden of demonstrating concretely why its interests are not adequately represented by the party States, the Report's approach conflicts with this Court's precedent. That conflict is reason enough to reject the Report's legal standard for intervention. However, as shown below, each of the four factors included in the test is individually flawed as well.

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[15] Courts of appeals routinely enforce the adequacy-of-representation standard where private parties seek to intervene in support of a government entity. *See San Juan County v. United States*, 503 F.3d 1163, 1203 (10th Cir. 2007) (en banc); *Maine v. Director, U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996); *City of Stilwell v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996); *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985).

2. The Report's "Instrumentality" Test Has No Basis in This Court's Precedent

The Report reads *New Jersey v. New York* and other cases where "the Court has allowed non-state entities . . . to be named as defendants" as authorizing intervention "in water disputes" by parties that are "accused of being the agent of injury" or the "instrumentality authorized to carry out the wrongful conduct." Report at 14, 21. In fact, the Report cites no case permitting a non-state entity to intervene in an original action because it is an "agent of injury" or "instrumentality."

In *New Jersey v. New York*, this Court did refer to New York City as "the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey." 345 U.S. at 375. But the Court was not justifying the City's continued presence in the lawsuit; it was explaining why New Jersey saw fit to name the City as a defendant, although one "subordinate to the parent state as the primary defendant." *Id.* The Court did not suggest — much less hold — that New Jersey's rationale for naming New York City as a defendant would have permitted the City to intervene over New Jersey's objection had New Jersey instead named only New York State as a defendant.

The other cases the Report cites in which a plaintiff State voluntarily elected to name both the State and non-state entities as defendants likewise shed no light on the standard applicable when a non-state entity seeks to intervene. In fact, all but one of the cases the Special Master cites was filed prior to

1932,[16] when the Court clarified that an equitable apportionment decree binds the citizens of party States. *See Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932); *Nebraska v. Wyoming*, 295 U.S. at 43; *cf. Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (raising but not deciding the question whether individual water-rights claimants in the defendant State should be joined as party defendants by the plaintiff State). Unsurprisingly, before the Court resolved that question, "the practice . . . developed of joining persons or entities within the defendant state whose claims appeared to be at stake." 4 Robert E. Beck *et al.*, *Waters and Water Rights* § 45.03(b), at 45-20 (1991 ed., 2004 replace. vol.). Since 1932, "individual water claimants usually have not been joined in equitable apportionment suits." *Id.* at 45-21.[17]

The Report errs further in assigning significance to the Court's failure in these cases to dismiss non-state entities *sua sponte* as improperly named parties.[18] Contrary to the Report's claim (at 16-17), the Court

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[16] The complaint in *Colorado v. Kansas*, 320 U.S. 383 (1943), was filed in 1928. *See id.* at 387-88. Report at 15.

[17] The one case cited by the Report filed after 1932 — *Arizona v. California*, 373 U.S. 546 (1963) — "presented special circumstances." Beck § 45.03(b), at 45-21. Namely, six of the seven non-state entities named had "contracts with the Secretary of the Interior," which Arizona alleged violated a federal statute. *Id.* The seventh non-state entity "was a party with the other six," to a contract that "was part of the framework of the water delivery contracts between the Secretary of the Interior and the other six." *Id.* at 45-21 to 45-22. Arizona apparently named these non-state entities because it "wanted to test the validity" of those contracts under the federal statute. *Id.* at 45-22.

[18] In none of the cases is there evidence that a party State — or the non-state entity itself — moved to dismiss the non-state entity.

has not used its authority to "decide[] whether and in what form the Court's original jurisdiction will be exercised" to pass on the appropriateness of the non-state entities a plaintiff State has voluntarily included as additional defendants. The only case the Report cites for that proposition is *Kentucky v. Indiana*. But, there, the Court allowed Kentucky to file its bill of complaint, which named Indiana and certain of its citizens. *See* 281 U.S. at 169-70. The Court further permitted the Indiana citizens to file a motion to dismiss the complaint in its entirety and heard argument on the motion, which it denied. *See id.* at 171-72. Only after a later hearing on the merits did the Court dismiss the Indiana citizens, based on its finding that Kentucky had failed to state a claim against them. *See id.* at 175 ("As no sufficient ground appears for maintaining the bill of complaint against the individual defendants, it should be dismissed as against them.").[19] Such a ruling on the merits does not support a non-state entity's entitlement to intervention.

More generally, the Report obliterates the distinction between joinder and intervention. Although the Report claims there is "not a compelling logical distinction" between cases where a State voluntarily names additional non-state entities as defendants and one in which such entities seek to intervene, over the objection of the plaintiff State, Report at 16, there is

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[19] Contrary to the Report's claim, the Court did not dismiss the Indiana citizens because it found their "interests would be represented sufficiently by the defendant state." Report at 17. The Court recognized that Indiana and its citizens were at odds and that the citizens sought "to contest . . . the position taken by the state." 281 U.S. at 173; *see id.* at 171-72. The Court held that the citizens had "no standing" to contest the State's position. *Id.* at 174.

both a logical and a legal distinction. Logically, the distinction comports with the principle that a plaintiff is master of the complaint and is in the best position to determine whether the defendant it chooses to sue can provide adequate relief for the claimed harms to the plaintiff State, which in turn shoulders the burdens and risks of litigating against additional defendants in other forums if the full relief sought against the named defendant State proves to be inadequate.[20] This Court has previously recognized that a State "may properly waive the protection" that the joinder rule provides against such duplicative litigation and has refused to permit intervention, over the opposition of a State, by a party that could have been joined. *See Utah v. United States*, 394 U.S. at 95. Legally, the distinction comports with the Federal Rules of Civil Procedure, which set different standards for joinder (Rules 19 and 20) and intervention (Rule 24).[21]

Finally, the Report's "agent of injury" or "instrumentality" test eviscerates the *parens patriae* principle that "the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *New Jersey v. New York*, 345

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[20] *Cf. Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005) (rejecting contention that complete diversity jurisdiction can be destroyed based on putative parties not named by plaintiff in the complaint).

[21] Parties that may properly be joined as defendants in a complaint under Rule 19 or 20 may — if not joined — be denied intervention. For example, an entity that has "an interest relating to the subject of the action," the resolution of which may "impair or impede the person's ability to protect the interest," is required to be joined. Fed. R. Civ. P. 19(a)(1)(B)(i). However, if such an entity is not joined and moves to intervene, intervention may be denied when "existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

U.S. at 372 (quoting *Kentucky v. Indiana*, 281 U.S. at 173). States act through agents — whether agencies, political subdivisions, or authorizations for citizens to act. In virtually all cases in which one State complains that another State has caused it injury, that injury will be carried out by the actions of an agent or instrumentality of the State. The Report's rule would permit all such agents — which may be numerous — to intervene, without regard to whether the State adequately represents their interests. Without any limiting principle, the Report's test subjects a State to the enormous additional costs, burdens, and delay of litigating against the putative "agents" of another State when that State itself has been accepted by this Court as a valid defendant that can provide the relief sought by the plaintiff State.

3. The Report's Invocation of an "Independent Property Interest" Relies on Distinguishable Cases Involving Real Property

The Report notes that the Court "allowed intervention by a non-state party whose property interests were at stake" in one case and indicated, in another, that intervention would be proper in such circumstances. Report at 19-20. The Report cites two cases, but both involved real property interests in discrete pieces of property. In *Texas v. Louisiana*, 426 U.S. 465 (1976) (per curiam), the United States claimed title to an island located within the City of Port Arthur; the City moved to intervene, the United States did not oppose, and the Court granted the

motion. *See id.* at 466.[22] Similarly, in *Utah v. United States*, the Court denied Morton International's motion to intervene after finding that a stipulation between Utah and the United States rendered it "unnecessary [for the Court] to consider whether the United States or [Morton] ha[s] title" to the lands in question. 394 U.S. at 93. The Court noted that Morton's motion "would have had a substantial basis" if its title to the property were at issue. *Id.* at 92.[23]

In both cases, the existence of a disputed title in real property between a private party and a sovereign entity was found sufficient — or, in the case of *Utah v. United States*, likely sufficient — to permit the private party to intervene to defend its claim of title to the unique property at issue. In those instances, the party State could not adequately represent the interests of the private party, which asserted its title to the property not only against the United States, but also against the State.

Such a real property dispute is inherently different from a dispute over water rights. Whereas land is quintessentially a non-fungible asset — and each of the cases discussed above involved disputes about

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[22] *See* Report of Special Master at 15-21, *Texas v. Louisiana*, No. 36, Orig. (Mar. 15, 1975) (recommending denial of United States' claim).

[23] Similarly, in *Oklahoma v. Texas*, 252 U.S. 372 (1920), which involved a dispute regarding title to a portion of the bed of the Red River, the Court appointed a receiver to hold and manage "all the lands" at issue, and proactively authorized Oklahoma and the United States to "make any claimant" to that property "a party to the cause." *Id.* at 372-73, 376. Numerous parties then "intervened for the purpose of asserting rights to particular tracts [of land] in the receiver's possession." *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922).

unique parcels of land — one gallon of river water is the same as any other. South Carolina does not seek to recover "Charlotte's" water any more than "CRWSP's" or "Concord's" or any other particular North Carolina user's. No water user has the kind of unique interest in the apportionment of an interstate stream that an owner of a particular parcel has toward real property. In the equitable apportionment context, the state-law rights of a "private appropriator" of water "can rise no higher than those of [the party State], and an adjudication of the [State's] rights will necessarily bind him." *Nebraska v. Wyoming*, 295 U.S. at 43. The Report's analogy to real property disputes, therefore, does not support intervention by water users in an equitable apportionment action.

4. The Report's "Direct Stake" Test Is Inconsistent with This Court's Precedent

A "direct stake" is an insufficient basis to support intervention. In recommending otherwise, the Report cites only *Maryland v. Louisiana*, 451 U.S. 725 (1981), and claims that the Court "has allowed non-state entities to be parties to original actions where they have a 'direct stake' in the action." Report at 19. The Report reads far too much into a single sentence in a lengthy footnote in that decision. *See* 451 U.S. at 745 n.21. In that case, eight States instituted an original action to challenge a Louisiana tax, which was "directly imposed on the owner of imported gas," normally the pipeline companies. *Id.* The plaintiff States did not pay the tax, but the Court found them to have standing as "consumers of natural gas" and as *parens patriae* on behalf of the "citizens in each of the plaintiff States [who] are themselves consumers of natural gas." *Id.* at 736, 739. A group of pipeline

companies that paid the tax sought to intervene. Those companies overwhelmingly were incorporated — and maintained principal places of business — in States not party to the case.[24] The Special Master had recommended that the Court grant the motions to intervene, expressly finding that "the interests of the pipelines differ from those of the states and the United States."[25] *Maryland v. Louisiana*, therefore, is better understood as an inadequate representation case, and not supporting the Report's novel creation of a "direct stake" test for intervention.[26]

No other case suggests that having a "direct stake," without more, warrants intervention. On the contrary, Philadelphia and Basin Electric Power Cooperative indisputably had "direct stake[s]" in *New Jersey v. New York* and *Nebraska v. Wyoming*.[27] Yet neither was permitted to intervene.

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[24] *See* Motion of Columbia Gas Transmission Corp. *et al.* at 31-34, *Maryland v. Louisiana*, No. 83, Orig. (U.S. filed Aug. 28, 1979).

[25] Report of Special Master at 7, *Maryland v. Louisiana*, No. 83, Orig. (May 14, 1980) ("No. 83 Report").

[26] Indeed, in *Maryland v. Louisiana*, after "noting that it is not unusual to permit intervention of private parties in original actions," 451 U.S. at 745 n.21 — although citing only the unusual case of *Oklahoma v. Texas*, 252 U.S. 372 (1920) (*see supra* note 23) — the Court also referenced *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), where it permitted intervention only after finding "sufficient doubt about the adequacy of representation" by the Secretary of Labor of the interests of the intervening union members, *id.* at 538.

[27] The Special Master in *Nebraska v. Wyoming* found that "Basin Electric had not shown a compelling interest in its own right that would not be properly represented by Wyoming." No. 108 First Report at 12. The Special Master, however, did not dispute that Basin Electric had shown a direct stake in

5. The Report's "Full Exposition" Factor Does Not Support Intervention

Finally, the Report claims that intervention may be appropriate when "the presence of the non-state entity would advance the 'full exposition' of the issues." Report at 21. The Report does not claim this as a sufficient basis for intervention, but rather as a factor to be considered "together with one or more of the above circumstances." *Id.* Even on this limited basis, however, the Report misstates the relevance of this "full exposition" factor.

The Report draws the "full exposition" language from the single sentence in *Maryland v. Louisiana* approving of the Special Master's decision to permit the pipelines to intervene, "in the interest of a full exposition of the issues." 451 U.S. at 745 n.21. However, the Special Master there had found that the "interests of the pipelines differ[ed] from those of the states and the United States," which therefore would not adequately represent the pipelines, even though all parties challenging the Louisiana tax "raise[d] the same issues and require[d] the same proof." No. 83 Report at 7. Neither the Special Master's report nor the Court's decision suggests that the ability of the pipelines to assist in the exposition of those issues would have supported intervention absent the divergence of interests among the pipelines as transporters, and the States as consumers, of the taxed gas.

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the case; rather, the Special Master found that Basin Electric's position was "comparable to that of the City of Philadelphia in *New Jersey v. New York*" and that Philadelphia "asserted unquestioned interest in the use of the Delaware River's water." *Id.* at 12 n.23.

To the extent the Report means to suggest that an entity's possession of information relevant to the factual development of a case supports intervention, that too is mistaken. *Cf.* Report at 30 (claiming that Duke "will provide a direct link" to other proceedings, which "will foster 'a full exposition of the issues'") (quoting *Maryland v. Louisiana*, 451 U.S. at 745 n.21). A non-state entity's possession of relevant information is no reason to permit that entity to intervene, thereby granting it the right — among others — to elicit facts from the party States through discovery and to contradict the State of which it is a citizen in advancing litigation positions on behalf of sovereign interests. On the contrary, participation as an *amicus curiae* enables such entities "both to preserve their interests and as traditional friends of the court to aid in full exposition of the issues," as the Special Master in *Nebraska v. Wyoming* recommended in denying numerous motions to intervene by non-state entities with "interests [that] could be represented by a current party." No. 108 First Report at 6, 8.[28]

Similarly, in *Maryland v. Louisiana*, the Special Master permitted an association representing gas distributors to file an *amicus* brief, finding that "the views of the distributors may be helpful in the dispo-

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[28] Approximately three years later, the same Special Master recommended denial of renewed motions for intervention, noting that "most of the *amici* have . . . participated to some degree in the current proceedings"; finding that none had "made the case for changed circumstances since June, 1989"; and reiterating that the *amici* are "potential sources of expertise." Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention at 101, 103, 104, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 9, 1992) ("No. 108 Second Report").

sition of the case." No. 83 Report at 9. The Report, however, gives no consideration of *amicus curiae* participation as an alternative. Nor does it acknowledge the sufficiency of third-party subpoenas as a mechanism for the party States to obtain the requisite information within proposed intervenors' custody and control for a "full exposition" of the issues.

II. PROPOSED INTERVENORS FAIL THE COURT'S STRICT STANDARD FOR INTERVENTION

Applying the correct legal standard, none of the intervenors is entitled to join this action. The Report fails to identify any cognizable interest — let alone any compelling interest — asserted by proposed intervenors that is not either adequately represented by North Carolina or collateral to this proceeding. Proposed intervenors therefore cannot overcome the strong presumption that "individual users of water . . . have no right to intervene in an original action in this Court." *United States v. Nevada*, 412 U.S. at 538.

A. Charlotte Is Not Entitled To Intervene

1. Charlotte Cannot Demonstrate Any Interest Not Adequately Represented by North Carolina

Charlotte must, at a minimum, point to some "concrete consideration" as to which its position in this litigation diverges from that of North Carolina. *New Jersey v. New York*, 345 U.S. at 374. Charlotte cannot do so because its interests align completely with North Carolina's.

The Report accepts Charlotte's interest in its interbasin transfer permit as the sole basis for recommending that Charlotte be allowed to intervene. *See* Report at 22, 25 ("Charlotte's right to

intervene turns on its status as one of the recipients of the three interbasin transfers that South Carolina identifies in its Complaint"). Although Charlotte asserts that North Carolina will not adequately represent its interests, North Carolina emphatically disagrees:

> [T]he State must represent the interests of every person that uses water from the North Carolina portion of the Catawba River basin. In fact, the State has a particular concern for its political subdivisions, such as Charlotte, which actually operate the infrastructure to provide water to the State's citizens. Charlotte has been granted authority by the State to make IBTs. The State has every reason to defend the IBTs that it has authorized for the benefit of its citizens. The State cannot agree with any implication that because it represents all of the users of water in North Carolina it cannot, or will not represent the interests of Charlotte in this litigation initiated by South Carolina.

NC Charlotte Resp. 1-2 (citations omitted).[29] The Report acknowledges that North Carolina's interests are "similar to" and "aligned with" Charlotte's, but identifies no respect in which North Carolina does not adequately represent Charlotte's interests. Report at 23-24. That alone disposes of Charlotte's motion for intervention.

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[29] North Carolina, like South Carolina, has the power and duty to represent its citizens and the public interest. *See, e.g., Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987); *State ex rel. Condon v. Hodges*, 562 S.E.2d 623, 628-29 (S.C. 2002). *See generally Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("[I]f the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them.")

Indeed, North Carolina and Charlotte stand in precisely the same relationship as Pennsylvania and Philadelphia in *New Jersey v. New York*. Like Pennsylvania, North Carolina represents "the interests of its citizens," and its "position remains vigorous and unchanged": "[s]he is opposed to any" reduction in the amount of water, "under the doctrine of equitable apportionment," that North Carolina currently uses. 345 U.S. at 374. Charlotte's "responsib[ility] for her own water system . . . is invariably served by [North Carolina's] position." *Id.*; *see Town of Grimesland v. City of Washington*, 66 S.E.2d 794, 798 (N.C. 1951) ("Municipal corporations are instrumentalities of the state for the administration of local government.").

Charlotte is likewise no different from Basin Electric, which moved to intervene in *Nebraska v. Wyoming*. Basin Electric explained that it managed the Grayrocks Dam and Reservoir, the operation of which Nebraska had identified in its complaint as a means by which Wyoming "[d]eplet[ed] the flows of the North Platte River."[30] The Special Master denied that motion, finding that "Basin Electric had not shown a compelling interest in its own right that would not be properly represented by Wyoming." No. 108 First Report at 12. Therefore, the Special Master found, "Basin's position [w]as comparable to that of the City of Philadelphia in *New Jersey v. New York*," which likewise was denied leave to intervene on the ground that "the state must be deemed to represent all of its citizens in an original case." *Id.* at 12 n.23.

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[30] Memorandum in Support of Motion of Basic Electric Power Cooperative for Leave To Intervene at 2-3, *Nebraska v. Wyoming*, No. 108, Orig. (U.S. filed Apr. 13, 1987) (quoting Pet. ¶ 3a, *Nebraska v. Wyoming*, No. 108, Orig. (U.S. filed Oct. 7, 1986)).

Although Charlotte attempts to establish that North Carolina cannot adequately represent its interests, Charlotte's claim raises precisely the kind of "intramural dispute" the Court refused to entertain in *New Jersey v. New York*. Charlotte contends that the "one clear difference" between its own interests and North Carolina's is that "North Carolina ... must balance the multiple interests of all upstream and downstream users of the River in the State whereas Charlotte's interests are exclusively downstream." Charlotte Mot. 19 (internal quotation marks and brackets omitted). That "difference" of interests, however, represents a purely intrastate struggle "over the distribution of water within" North Carolina and cannot satisfy the Court's requirement of showing an interest "not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373.

2. *Charlotte's Interbasin Transfer Permit Does Not Set It Apart from Other Water Users in North Carolina*

The Report recommends that Charlotte be permitted to intervene because South Carolina's Complaint identifies Charlotte's interbasin transfer as an example of North Carolina's water consumption in excess of its equitable share. *See* Report at 25. Like Philadelphia, however, Charlotte "represents only a part of the citizens of [North Carolina] who reside in the watershed area of the [Catawba] River and its tributaries and depend upon those waters." *New Jersey v. New York*, 345 U.S. at 373. Even considering IBTs alone, North Carolina has identified at least 22 other interbasin transfers of water from the Catawba River Basin, which North Carolina's IBT statute expressly authorizes (but for which a specific permit is not required). *See* SC Br. in Response to CMO No. 3

as to the Scope of the Complaint 5 & Ex. 1 (Mar. 20, 2008). The congruence of Charlotte's interest in defending the current IBT regime with that of other transferors precludes any "practical limitation on the number of similarly situated entities that would be entitled to be made parties." Report at 25 (citing *New Jersey v. New York*, 345 U.S. at 373).

The Report's recommendation is problematic for another reason. South Carolina discussed two recent approved transfers and one requested transfer in the Complaint by way of example (the 2002 Charlotte-Mecklenburg permit, a 2007 permit to the Cities of Concord and Kannapolis, North Carolina, and a permit increase request by Union County, the North Carolina component of CRWSP). Those examples served to describe the current harms alleged in the Complaint, their continued effects for the foreseeable future, and the deficiency in North Carolina's IBT statute in failing to take into account harms to South Carolina from such transfers.

South Carolina noted those withdrawals to illustrate that North Carolina's position "that she as a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained." *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922). Under the Report's reasoning, a State opens the door to possible intervention by providing more detail in its pleadings. The Report's overly permissive approach to intervention thus paradoxically discourages States from providing more detailed pleadings that enable prompter resolution of disputes.

As the Special Master has concluded, South Carolina's Complaint does not seek to enjoin any particular transfer (as did the Complaint in *New Jersey v. New York*, 345 U.S. at 370-71),[31] but rather prays for a decree equitably apportioning the Catawba River and enjoining *any and all* withdrawals from the River in excess of North Carolina's equitable share. *See* CMO No. 8, at 4. South Carolina's request for an equitable apportionment thus "encompasses a broader inquiry" that, under the Court's precedents, "requires the consideration of many factors," including but not just North Carolina's IBTs.[32]

Similarly, South Carolina's alleged injuries are not limited to those caused solely by Charlotte's activity. Rather, the *cumulative* effects of withdrawals in North Carolina result in low flows across the border and harms to South Carolina's citizens. Whether water is withdrawn by any specific North Carolina user is of no moment to South Carolina. Charlotte occupies the same position as all other Catawba River water users with regard to its interests in ensuring that any equitable apportionment decree does not disrupt its current water uses. Charlotte, therefore, cannot demonstrate an interest "apart from

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[31] South Carolina did seek a preliminary injunction that would have prevented North Carolina from authorizing additional transfers during the pendency of this litigation. North Carolina pledged not to authorize any such transfers. The Court denied South Carolina's motion.

[32] CMO No. 8, at 4 (citing *Colorado v. Kansas*, 320 U.S. at 393-94 ("all the factors which create equities in favor of one state or the other must be weighed"); *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945) (factors include (among others) "the consumptive use[s] of water in the several sections of the river, the character and rate of return flows, [and] the extent of established uses")).

[its] interest in a class with all other citizens and creatures of the state." *New Jersey v. New York*, 345 U.S. at 373.

3. Charlotte's State-Law Permit Rights Are Not Compelling

Charlotte also fails to meet the first *New Jersey* requirement because its state-law rights as a permit holder are not "compelling" in this equitable apportionment case. This Court has made clear that "state law cannot be used" to resolve disputes between States about the use of an interstate river. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981); *see also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981) ("our federal system does not permit the controversy to be resolved under state law"). State-law water-use rights have accordingly proved insufficient to warrant intervention. For example, Charlotte's permit rights are no more compelling than those of the storage contract holders in *Nebraska v. Wyoming*, which the Court deemed insufficient to justify intervention. *See* 515 U.S. at 21. Indeed, the Court concluded that the storage contract holders would be denied intervention in that case even though it acknowledged that the scope of their contract rights would likely be adjudicated in the action. *See id.* Nor does Charlotte's permit authority differ in kind from Philadelphia's "Home Rule Charter," which was not a justifiable basis for intervention. *See New Jersey v. New York*, 345 U.S. at 374. Any interest Charlotte has in preserving its state authorization to consume water, therefore, cannot rise to a "compelling" interest to support intervention.

B. CRWSP's Motion Fails For Substantially Similar Reasons As Charlotte's

The Report treats CRWSP's motion as "similar analytically to Charlotte's." Report at 25. For all the reasons set forth in Point II.A, *supra*, CRWSP cannot make the showing required by *New Jersey v. New York*. Indeed, like Charlotte, CRWSP fails all three of *New Jersey*'s requirements.

CRWSP is a joint venture between two municipalities, Union County, North Carolina, and the Lancaster County Water and Sewer District in South Carolina. Although CRWSP withdraws all of its water on the South Carolina side of the boundary, much of that water is transported via pipeline for consumption in North Carolina.

As with Charlotte, the Report recommends that CRWSP be granted intervention "in order to defend its transfer, which is the subject of South Carolina's claim for relief." Report at 27-28. Again, the Report ignores that South Carolina's relief does not specifically target CRWSP's transfer rights or that CRWSP's interests are adequately represented by the party States. North Carolina has stated directly that it "has every reason to defend the IBTs that it has authorized for the benefit of its citizens." NC Charlotte Resp. 2. By the same token, South Carolina "must be deemed to represent all its citizens," *New Jersey v. New York*, 345 U.S. at 372 (internal quotation marks omitted), including its political subdivisions such as LCWSD.

CRWSP relies on its bi-state status to justify intervention, but the Report correctly rejected that argument. *See* Report at 27. CRWSP has not argued that either of its member municipalities would itself be permitted to intervene — nor could it. And CRWSP

does not argue for intervention based on its South Carolina consumption, because to do so presumably would align its interests with South Carolina's. The fact that CRWSP is a cross-boundary joint venture between municipalities does nothing to change the character of its interest as a stalking horse for North Carolina water users. The municipalities composing CRWSP inherently advance only state-law interests, which amplifies the reasons for denying intervention.

As with Charlotte, CRWSP's interests in water consumption (in either State) are far from unique or compelling. Indeed, the Court's fear that permitting Philadelphia to intervene would invite more "political subdivisions of the states" and "[l]arge industrial" water users to intervene (*New Jersey v. New York*, 345 U.S. at 373) was prescient: the Report's reasoning for admitting Charlotte leads directly to a similar recommendation that two more municipalities (through CRWSP) and a private corporation (Duke, discussed below) also be admitted. The Report itself thus illustrates the problem with ignoring the critical limiting principle of the *New Jersey* test — that the proposed intervenor demonstrate an interest that is "not properly represented by the state." *Id.* Because CRWSP cannot meet that requirement — or the other two prongs of the *New Jersey* test — its motion should be denied.

C. Duke's Claimed Interests Provide No Basis For Intervention Because They Rest On Its Status As A Water User And Are Collateral To This Action

Like Charlotte, Duke is a very large consumer of water, both in operating its hydroelectric plants and in cooling its nuclear facilities. This Court has consistently held that private water users — even

"[l]arge industrial plants which ... are corporate creatures of the state" and have "substantial" interests in the use of river water — have no right to intervene in equitable apportionment actions. *New Jersey v. New York*, 345 U.S. at 372-74; *see supra* p. 20.

The Report recommends granting Duke's motion on the ground that Duke purportedly has "strong and independent interests that could affect, or be affected by, the outcome of this proceeding" and that justify intervention. Report at 28. First, the Report relies on Duke's claim that, through its reservoirs, it "controls the flow of the Catawba River" such that "any Court-ordered alteration of the flow would [likely] be carried out by Duke and would directly affect its operations." *Id.* at 29. "Second, and relatedly, the terms of Duke's existing and prospective licenses, as well as the negotiated terms agreed upon by relevant stakeholders through the CRA, are relevant to the proceedings here." *Id.*[31] Those factors, however, do not justify intervention under the proper test.

1. Duke's Interests Are Adequately Represented

As with Charlotte and CRWSP, the Report does not claim that North Carolina fails to represent the Duke interests found to justify intervention. Nor could it. As the Report recognizes, North Carolina itself has argued that the CRA is sufficient to protect South Carolina's interests. *See* NC Opp. 11-17. North Carolina thus will advance Duke's similar interest in defending the CRA: because the Low Inflow Protocol

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[31] The Report also cites as a third factor "the *process* that Duke orchestrated ... that resulted in the CRA." Report at 31, which is merely derivative of the second factor.

contained within the CRA sets minimum outflows that Duke must send to South Carolina in times of low inflows to the Catawba River Basin, Duke's interests in its reservoir operations will be represented by North Carolina's advocacy. Duke thus stands in a similar position to Philadelphia in *New Jersey v. New York*.[34]

Duke has argued that North Carolina's advocacy for the CRA is not adequate to represent Duke's interests because North Carolina (like South Carolina) in addition "may seek to maximize its portion" of the River, which "may endanger the negotiated solution embodied in the CRA." Duke Reply 11. That assertion, however, raises an intramural dispute between Duke and North Carolina over how North Carolina law will apportion that State's equitable share of water among its users. To the extent Duke consumes water in North Carolina, that State represents its interests here; the same is true of South Carolina, to the extent Duke consumes water on that side of the boundary. As the Special Master correctly found with respect to CRWSP, as an "ordinary user of water" — even one located, like CRWSP, on both sides of the river — Duke lacks "a sufficiently compelling basis to intervene in an original action." Report at 27. Whatever the total allocation made to each State, Duke and other water users will be able to ask the States to allocate sufficient water to sustain their individual uses, and this Court has

[34] *See* Report at 30 ("The terms of the CRA are central to the defenses asserted by North Carolina, which contends, in essence, that the CRA provides South Carolina with more than enough water to meet its needs, thus obviating this proceeding.").

made clear that it will not use its original jurisdiction to make such intrastate apportionments.[35]

2. Duke's Interests Are Not Compelling or Different from Other Water Users'

Duke's two related interests — its reservoir operations and defense of the CRA that Duke has requested FERC to approve — are simply other ways of describing Duke's interests as a large water user, for they concern Duke's ability to use Catawba River water. The more water Duke has in its reservoirs from any success by South Carolina in reducing North Carolina's equitable right to consume the upstream water of the River, the more easily it can comply with its federal license obligations. Duke's prayer for relief reflects its interests as a water user, by asking this Court to "protect Duke's riparian interests in the Catawba River flow and its interests in the excess water created by Duke's impoundments." Duke Answer 5.[36]

Thus, Duke's interest in its reservoir operations is indisputably grounded in Duke's interests in using the waters of the Catawba River, an interest that this Court has held does not justify intervention.

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[35] Duke's status as a signatory to the CRA provides no "practical limitation on the number of similarly situated entities that would be entitled to be made parties." Report at 25 (citing *New Jersey v. New York*, 345 U.S. at 373).

[36] Duke otherwise concedes that its interest as a consumer of water is *not* sufficient to justify intervention. *See* Duke Clarify/Reconsider Opp. 10 n.5 (July 10, 2008) ("Duke is a significant consumer of water. But as South Carolina notes, 'Duke has not asserted [its] interests as a consumer' in support of intervention[.]") (quoting SC Clarify/Reconsider Mot. 17). That concession proves that Duke's assertion of its water-use rights cannot form the basis for its intervention.

Duke's interest in the CRA is no different, for if approved it would establish certain minimum-flow requirements to which Duke would have to adhere. *See* Duke Mot. 6 ("[T]he CRA would establish the minimum daily flow from Lake Wylie [located at the boundary between the States] in a variety of settings, from no drought . . . through [various] drought conditions."). Tellingly, the Report rejected as a basis for intervention Duke's asserted "public interest" duty to comply with its FERC license and federal law. Report at 31 n.3. The intervention recommendation thus is based solely on Duke's parochial interest in controlling the Catawba River's flow in such a way as to maximize shareholder profits from Duke's power generation operations — precisely the type of "large industrial plant" interests that *New Jersey v. New York* explained cannot justify intervention in an equitable apportionment action.

3. South Carolina's Requested Relief Would Not Undermine Duke's Ability To Operate Its Reservoirs

South Carolina seeks a decree that would apportion the Catawba River and *reduce* the total consumption and pollution by entities in North Carolina as a whole. Any such reductions would necessarily *increase* the amount of water available for Duke to manage in its reservoirs and to discharge into South Carolina, particularly in times of drought or low flows. The availability of additional water would make it *easier*, not harder, for Duke to manage the flow of the River and to meet any obligations it has in its licenses or in the CRA (if and when approved by FERC). Accordingly, the CRA poses no conflict with the determination of North Carolina's and South Carolina's respective rights to the River in this case.

The Report identifies no serious likelihood that the Court's decree could conflict with federal licenses or the CRA. Duke thus lacks a "compelling" interest sufficient to justify intervention.

4. The Proposed CRA Expressly Carves Out the Types of Interests Addressed in an Equitable Apportionment of the Catawba River

Neither Duke nor the Report has shown that this Court's determination of the party States' respective rights to an equitable apportionment of the Catawba River would disrupt the terms of the CRA, if and when approved by FERC. The hypothetical danger of a conflict between Duke's prospective license and equitable apportionment is insufficient to justify intervention.

FERC's consistent practice has been to craft licenses so as not to intrude on any equitable apportionment by the Court.[37] Moreover, the CRA, by its plain terms, does *not* purport to control any of the disputed water consumption in North Carolina that is at issue here and, instead, expressly *disclaims* resolution of the water-rights issues raised in this case:

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[37] *See, e.g., Virginia Electric Power Company d/b/a Dominion Virginia Power/Dominion North Carolina Power*, 110 FERC ¶ 61,241, at 61,948 (2005) ("[T]his Agreement shall not be construed to limit in any way any right of the State of North Carolina . . . to seek an equitable apportionment of the waters of the Roanoke River."); *see also PacifiCorp*, 105 FERC ¶ 62,207, at 64,476 (2003) ("[n]othing in this article shall require the licensee to violate its obligations under . . . . or permit or require any action inconsistent with, the water contracts and agreements, interstate compact, judicial decrees, state water rights, and flood control responsibilities"), *clarified on reh'g*, 106 FERC ¶ 61,307 (2004).

> Water Rights Unaffected – This Agreement does not release, deny, grant or affirm any property right, license or privilege in any waters or any right of use in any waters.

CRA § 39.9. Duke's relicensing application similarly acknowledges that a determination of such water rights is beyond the scope of the FERC proceeding.[38]

Indeed, the CRA, and in particular the LIP, operates on the principle that, the more water Duke receives upstream, the more water it should release downstream. *See* NC App. 6a-7a (describing various stages of the LIP). If South Carolina's suit is successful, Duke will have more water with which to comply with its federal license obligations, not less. Therefore, the danger of a "conflict" between Duke's prospective license and this Court's determination of the party States' respective rights to the Catawba River is, at best, highly speculative and plainly insufficient to support intervention.

Finally, to the extent Duke seeks to participate in this action not to defend any *actual* license or pending application, but rather the "scientific data and conclusions" that underlie the CRA, Report at 31, Duke will have every opportunity to make that showing before FERC. FERC will set Duke's licensing conditions in the first instance and will evaluate directly the validity of any scientific data and conclusions that support Duke's application.

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[38] *See* Duke Energy Application for New License at ES-21, Catawba-Wateree Project (FERC No. 2232) (FERC filed Aug. 29, 2006) ("[T]his Application does not comprehensively assess nor take a position on the approval of such future requests. Public policy for inter-basin water transfers is clearly the exclusive jurisdiction of the state agencies and was, therefore, not addressed during the relicensing process.")

5. Duke Should Not Be Permitted To Intervene Merely To Provide the Court with Access to Potentially Relevant Information

The Report states that quantifying the amount of water that would be available to South Carolina but for over-appropriated uses in North Carolina "will require an analysis of Duke's operations and the flows that it is required to maintain from its reservoirs into South Carolina." Report at 28-29. The Report thus suggests that a proposed intervenor's *possession of information* essential to the case is sufficient to permit intervention. Neither Duke nor the Report offers any instance in which this Court has permitted full party status in an original action simply because an entity claims to possess relevant information, and there is none. *See supra* p. 37.

Moreover, intervention is not the only means by which to obtain access to information that the Special Master deems essential to the Court's apportionment analysis. The FERC proceedings respecting Duke's license application are a matter of public record, and the parties have already brought and will continue to bring the relevant portions of those legal sources to the attention of the Court and the Special Master.

To the extent Duke has factual or technical information and expertise that would aid the Court's analysis and that is otherwise unavailable, that information can be obtained through other means, such as third-party subpoenas or by the submission of an *amicus curiae* brief. Indeed, that is the more common role for interested persons with material information not already brought to the Court's atten-

tion by parties to the case.[39] The Report fails to explain why such an *amicus curiae* role would not enable each of the proposed intervenors sufficient opportunity to represent their interests.

The Special Master presiding over a similar issue presented in *Alaska v. United States*, 545 U.S. 75 (2005), made a similar recommendation, rejecting third-party intervention in an original action and relying on the observation of a federal district court:

> It is easy enough to see what are the arguments against intervention where, as here[,] the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.

No. 128 Report at 21-22 (quoting *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943)). Similarly, the Special Master in *Nebraska v. Wyoming* recommended denial of numerous motions to intervene, but permitted those same parties to participate as *amici curiae*, "as traditional friends of the court to aid in full exposition of the issues" and as "potential sources of

[39] CRWSP, for instance, concedes that, "whether the [proposed] Intervenors participate in this case as parties or as amici, their legal arguments would be the same." CRWSP Letter Br. 2 (U.S. filed Dec. 8, 2008).

expertise." No. 108 First Report at 6; No. 108 Second Report at 104.

CONCLUSION

The Exceptions of the State of South Carolina to the First Interim Report of the Special Master should be sustained, and the motions for leave to intervene of Charlotte, CRWSP, and Duke should be denied.

Respectfully submitted.

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No. 138, Original

In the Supreme Court of the United States

STATE OF SOUTH CAROLINA, PLAINTIFF

v.

STATE OF NORTH CAROLINA

ON EXCEPTIONS
TO THE FIRST INTERIM REPORT
OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF'S EXCEPTIONS

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QUESTION PRESENTED

Whether, in an action between two sovereign States seeking an equitable apportionment of an interstate river, an individual user of the river's water has an interest sufficiently distinct from the State's to justify intervention.

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ON EXCEPTIONS
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF'S EXCEPTIONS

INTEREST OF THE UNITED STATES

South Carolina's exceptions to the First Interim Report of the Special Master present a question regarding the standards for intervention in interstate equitable-apportionment cases brought in this Court under its original jurisdiction. The United States administers numerous water projects and represents sovereign interests of the United States and various Indian Tribes in interstate litigation, including equitable-apportionment actions. See, *e.g.*, *Arizona* v. *California*, 547 U.S. 150, 150 (2006); *Nebraska* v. *Wyoming*, 515 U.S. 1, 4 (1995). The United States also frequently participates in other litigation within the Court's original jurisdiction, as a plaintiff, a defendant, and an intervenor. *E.g.*, *United States* v. *Alaska*, 521 U.S. 1, 4 (1997) (plaintiff); *Califor-*

nia ex rel. State Lands Comm'n v. *United States*, 457 U.S. 273, 277 & n.6 (1982) (defendant); *Texas* v. *Louisiana*, 414 U.S. 1107 (1973) (mem.) (intervenor). The United States therefore has an interest in the proper application of this Court's standards governing intervention in those proceedings, particularly as they implicate the orderly and efficient litigation and resolution of disputes among sovereigns.

The United States has also submitted its views as amicus curiae on other matters relating to the management of the Court's original-jurisdiction docket, often at the Court's invitation. See, *e.g.*, *Montana* v. *Wyoming*, 550 U.S. 932 (2007); *Alabama* v. *North Carolina*, 537 U.S. 806 (2002).

STATEMENT

The State of South Carolina sought and received this Court's leave to file a bill of complaint against the State of North Carolina, seeking an equitable apportionment of the Catawba River. 128 S. Ct. 349 (2007). Three non-state entities sought to intervene as defendants supporting North Carolina. This Court referred the dispute and the motions to intervene to Special Master Kristin Linsley Myles. 128 S. Ct. 1117 (2008); 128 S. Ct. 1694 (2008). In her First Interim Report, the Special Master recommended granting the motions to intervene. South Carolina now excepts to that ruling.

1. The Catawba River rises in the Blue Ridge Mountains of North Carolina and flows east and south into Lake Wylie, a reservoir on the South Carolina border. The Catawba then continues south into South Carolina, where it meets Big Wateree Creek and becomes the Wateree River. Compl. ¶¶ 1, 8, 9. The Wateree eventually becomes the Santee River, which empties into the

Atlantic Ocean approximately 440 miles from the Catawba's headwaters. Answer ¶ 10.

The river is heavily regulated and developed, and is a source of water supply in both States. During times of drought, it is claimed, there is insufficient flow to support water needs in both States. Compl. ¶¶ 8, 10, 11, 15, 17.

2. South Carolina sought leave to invoke this Court's original jurisdiction and commence an action against North Carolina based on its contention that North Carolina has removed more than its fair and equitable share of water from the Catawba. Compl. ¶ 24. South Carolina asked that the Court equitably apportion the Catawba between the two States. Compl. 10.

South Carolina's allegations focus particularly on transfers made pursuant to North Carolina's interbasin transfer statute, N.C. Gen. Stat. § 143-215.22G *et seq.* (2007 & Supp. 2008), which authorizes the transfer of large volumes of water between river basins. The statute requires permitting and state regulatory approval for any transfer over 2 million gallons per day (mgd). N.C. Gen. Stat. § 143-215.22L(a)(1) (Supp. 2008). South Carolina alleges that North Carolina has authorized the transfer of at least 48 mgd from the Catawba River Basin to other basins. Compl. ¶ 3.

According to the complaint, the largest beneficiaries of such permitted transfers have been the Cities of Charlotte, Concord, and Kannapolis, North Carolina. Compl. ¶ 20. South Carolina alleges that a grandfather provision of the statute has also permitted the Catawba River Water Supply Project (CRWSP), which was formed by two adjacent counties in North and South Carolina, to transfer at least 5 mgd from the Catawba.

See Compl. ¶ 21; CRWSP Br. in Supp. of Mot. for Leave to Intervene 1.

The complaint seeks an equitable apportionment of the Catawba and related injunctive and declaratory relief. Specifically, the complaint asks that this Court "enjoin[] North Carolina from authorizing transfers of water from the Catawba River * * * inconsistent with that apportionment." Compl. 10. And the complaint asks that North Carolina's interbasin transfer statute be declared invalid "to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment." *Ibid.*

3. This Court granted leave to file the bill of complaint and directed North Carolina to answer. 128 S. Ct. 349 (2007).

Soon thereafter, three proposed intervenors sought to enter the action. The city of Charlotte; the CRWSP; and Duke Energy Carolinas, LLC (Duke), which operates Lake Wylie and the other hydropower dams on the Catawba, see Duke Br. in Supp. of Mot. to Intervene and File Answer 1-2, all sought to participate based on their interest in using the waters of the Catawba.

This Court appointed the Special Master and referred the case to her, including the motions to intervene. 128 S. Ct. 1117 (2008); 128 S. Ct. 1694 (2008). South Carolina opposed the motions, while North Carolina took no position. N.C. Br. in Opp. to S.C.'s Mot. to File Exceptions 1.

4. The Special Master recommended granting all three motions to intervene. First Interim Report of the Special Master 1-43 (Report).

a. Observing that "the Court's practice has been to allow non-state entities in appropriate circumstances to join, or be joined in, an original action," Report 12, the

Special Master looked to a wide variety of this Court's original-jurisdiction cases for guidance. Although South Carolina pointed out that "the Court never has permitted a private person or non-sovereign entity, including a municipality, to intervene in an original equitable apportionment action," the Special Master concluded that drawing the relevant standard only from equitable-apportionment cases would focus "too narrowly." Report 24. The Special Master accordingly looked to the standards for intervention in other types of original-jurisdiction cases. Report 23-24. She also attributed significance to cases in which the Court permitted States to sue non-state entities. Report 14-16, 25. Although the Special Master recognized that in those cases "the non-state entities were named as defendants by the complaining state, and thus did not voluntarily seek the Court's permission to intervene," she saw no "compelling logical distinction" between those cases and cases involving motions to intervene. Report 16.

From those precedents, the Special Master "distilled the following rule":

> [N]on-state entities may become parties to * * * original disputes in appropriate and compelling circumstances, such as where the non-state entity is the instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief, where the non-state entity has an independent property interest that is directly implicated by the original dispute or is a substantial factor in the dispute, where the non-state entity otherwise has a "direct stake" in the outcome of the action within the meaning of the Court's cases discussed above, or

> where, together with one or more of the above circumstances, the presence of the non-state entity would advance the "full exposition" of the issues.

Report 20-21.

b. The Special Master concluded that under the rule she developed, all three non-state entities should be granted intervention. First, in the Special Master's view, South Carolina's complaint that North Carolina was diverting too much water referred specifically to waters diverted and used by Charlotte, "such that [Charlotte] should be permitted to defend itself." Report 22. The Special Master considered Charlotte to be not merely a "user of water," which she acknowledged would be insufficient to justify intervention. *Ibid.* (citing *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam)). Rather, she thought, Charlotte would be directly affected if the Court granted the injunction South Carolina had requested. *Ibid.* Although the Special Master recognized that North Carolina's interests were aligned with Charlotte's, and that the Court had never authorized such an intervention in the equitable-apportionment context, she thought those facts "should not foreclose intervention." Report 23; see Report 25.

Second, the Special Master concluded that CRSWP's basis for intervention was "similar analytically." Report 25. CRSWP, like Charlotte, is referred to in the complaint, and the Special Master stated that CRSWP therefore was more than just "a mere user of water." Report 26. CWSRP had argued in the alternative that it should be allowed to intervene whether or not its interest in the Catawba's water is unique, because of its nature as a bi-state entity (a joint venture of a North Carolina county and a South Carolina water district). The Special Master rejected that alternative argument

as "not compelling," Report 27, and her recommendation rested entirely on CRSWP's purported role in carrying out the complained-of diversions.

Third, although Duke was not discussed in connection with South Carolina's request for injunctive relief, the Special Master thought that Duke's river operations "would be affected by any decree in this action" because its dams effectively control the flow of the Catawba by impounding and releasing its water. Report 28. The Special Master also suggested that Duke might have to change its Comprehensive Relicensing Agreement (CRA), which is pending before the Federal Energy Regulatory Commission (FERC), based on challenges to the "scientific models and assumptions" underlying the CRA that are likely to be presented in this litigation. Report 30. Accordingly, the Special Master concluded that Duke has sufficient unique and directly affected interests to justify intervention to represent and defend those interests. Report 28-32.

SUMMARY OF ARGUMENT

The Special Master sought to formulate a single, one-size-fits-all rule to govern non-state parties' participation in original actions in this Court—whether as named defendants or as intervenors, and whether the action involves water, nuisance, or any other subject. That proposed rule does not take adequate account of the special sovereign interests that are at stake in equitable-apportionment actions. Cases like this one ask this Court to resolve a sovereign dispute over a limited resource that is used by many individuals and public and private entities within each of the party States. The showing required to justify participation by non-sovereigns must accordingly be significantly higher, particu-

larly where the non-sovereign's reason for participation is the pursuit or protection of a water use or claim that arises under state law.

This Court set the standard for permitting intervention in this context in *New Jersey* v. *New York*, 345 U.S. 369 (1953) (per curiam). There a city with an interest in the water of the river whose waters were the subject of the original action sought to intervene, and this Court denied permission, because the city was properly represented by its State in the dispute among sovereigns. The Court held that because of the sovereign nature of the dispute, "[a]n intervenor whose state is already a party should have the burden of showing *some compelling interest in his own right*, apart from his interest in a class with all other citizens and creatures of the state, *which interest is not properly represented by the state*." *Id.* at 373 (emphases added). That is the test the Special Master should have applied. The Special Master incorrectly discounted that holding, largely because the Court allowed another city to remain in the action *as a named defendant*, an entirely different matter subject to different standards.

Applying the correct analysis reveals that the proposed intervenors do not have a sufficiently distinct interest at stake to justify allowing them to interject themselves into this case as parties alongside the States. Rather, they have the same interest as everyone in the Catawba River Basin who hopes to draw water from the river following the equitable apportionment. The breadth of the right to intervene that the Special Master's rule would introduce is reason enough to reject that rule in apportionment cases, which would become immeasurably more complex and difficult to settle with the addition of each new non-sovereign party.

ARGUMENT

HOLDERS OF STATE-LAW WATER RIGHTS DO NOT SATISFY THE STANDARD FOR INTERVENTION IN A SOVEREIGN DISPUTE BETWEEN STATES OVER THE EQUITABLE APPORTIONMENT OF A RIVER

A. The Court Has Enunciated Stringent Standards For Intervention By Non-Sovereigns In Original Actions

1. This Court has original jurisdiction over a justiciable controversy to which a State is a party. See U.S. Const. Art. III, § 2, Cl. 2. This Court's jurisdiction is exclusive if the dispute is between States, but otherwise is concurrent. See 28 U.S.C. 1251(a), (b)(2) and (3). In both types of cases, this Court retains discretion whether to permit a complaining State to initiate suit, and it grants such leave only "sparingly." *E.g.*, *Wyoming* v. *Oklahoma*, 502 U.S. 437, 450 (1992) (citation omitted). "The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas* v. *New Mexico*, 462 U.S. 554, 571 n.18 (1983).

Exercising its discretion, this Court often declines to entertain suits brought by States against citizens of another State, including municipalities and other corporate citizens. *E.g.*, *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 108 (1972); *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 504 (1971). Indeed, even when one State sues another in an action within this Court's exclusive jurisdiction, the plaintiff State may not be permitted to maintain a separate cause of action against non-state parties as defendants when the defendant State sufficiently represents that side of the controversy. *E.g.*, *Kentucky* v. *Indiana*, 281 U.S. 163, 174-175 (1930).

For similar reasons, this Court has often declined to permit non-sovereign entities to force their way, through intervention, into a dispute between sovereigns. See, *e.g.*, *Alaska* v. *United States*, 534 U.S. 1103 (2002) (mem.); *New Jersey* v. *New York*, 514 U.S. 1125 (1995) (mem.); *Ohio* v. *Kentucky*, 456 U.S. 958 (1982) (mem.); *Kentucky* v. *Indiana*, 456 U.S. 958 (1982) (mem.); *Vermont* v. *New York*, 405 U.S. 983 (1972) (mem.)

2. Equitable-apportionment actions involve the "unique interests" of sovereign States, *Colorado* v. *New Mexico*, 467 U.S. 310, 316 (1984), interests that "would be settled by treaty or by force" if the States were sovereign nations. *Kansas* v. *Colorado*, 206 U.S. 46, 98 (1907). The balancing of those interests "rises, therefore, above a mere question of local private right." *Id.* at 99; see *Wyoming* v. *Colorado*, 286 U.S. 494, 508-509 (1932) (describing an equitable-apportionment action as "one between States, each acting as a quasi-sovereign and representative of the interests and rights of her people"). For those reasons, the considerations that this Court considers in managing its original-jurisdiction docket apply with particular force to equitable-apportionment actions.

In an equitable-apportionment action, this Court applies federal common law principles to allocate to each of the competing States a specified share of the waters of an interstate river. *E.g.*, *Colorado* v. *New Mexico*, 459 U.S. 176, 183 (1982); *Arizona* v. *California*, 373 U.S. 546, 597 (1963). An equitable-apportionment action culminates in a decree, which typically establishes the respective rights of the States (and in some cases the United States or Indian Tribes) to divert or store interstate waters, defined in terms of flow, volume, timing, or

a combination thereof. See, *e.g.*, *Colorado* v. *New Mexico*, 459 U.S. at 185 n.10.

In arriving at an equitable apportionment, this Court does give some weight to individuals' water use, as protected by state law. But that factor is only one among many, and this Court has repeatedly stressed that it will not simply mandate a rule of interstate priority, under which a more senior water right trumps a more junior. See *Colorado* v. *New Mexico*, 459 U.S. at 184-188; *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945). Rather, the Court determines the *overall* share of water to be allocated to each State, and state law then determines how that share is to be allocated among individual water users within that State. See, *e.g.*, *Arizona* v. *California*, 373 U.S. at 601 (confirming that "all uses of mainstream water within a State are to be charged against that State's apportionment"); *Nebraska* v. *Wyoming*, 325 U.S. at 608 (equitable apportionment was required because state law had "over-appropriated" the river beyond what the natural flow would dependably provide).

Because the equitable apportionment considers the interests of the States as sovereigns, the result binds not only the States but their water users as well, without the need for the water users to be separately represented. This Court made that clear in *Wyoming* v. *Colorado*, *supra*, in which it enforced an apportionment against a violating State. The Court had decreed a particular volume of water from the Laramie River to Colorado, based on the amounts historically diverted in four Colorado locations, and a particular volume to Wyoming. See 286 U.S. at 496. Colorado then began permitting diversions of water in locations other than the four places mentioned in the decree, causing Wyoming not to receive its full allocation. See *id.* at 508-509, 510. Colorado argued

that claims for those diversions "could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein." *Id.* at 508. This Court squarely rejected that contention: the equitable-apportionment suit was "one between States" as "quasi-sovereign[s]," and therefore "the water claimants in Colorado, and those in Wyoming, *were represented by their respective States and are bound by the decree*." *Id.* at 508-509 (emphasis added); accord *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) ("Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact.").

3. Because equitable-apportionment actions adjudicate the States' sovereign interest in an equitable share of water, this Court has strictly limited intervention in those cases by non-sovereigns, such as the proposed intervenors here.

a. In *New Jersey* v. *New York*, 345 U.S. 369 (1953) (per curiam), this Court denied permission for Philadelphia to intervene in an equitable-apportionment action in which Pennsylvania was already a party. New Jersey had sued New York (and New York City) concerning the waters of the Delaware River, Pennsylvania had intervened, and the Court had entered its equitable decree. *Id.* at 370-371. Twenty years later, the defendants sought to reopen the decree. Pennsylvania opposed reopening, and at that point Philadelphia sought to intervene, citing its own interest in Delaware River water. See *id.* at 371-372.

This Court denied permission to intervene, holding that "[a]n intervenor whose state is already a party should have the burden of showing *some compelling interest in his own right*, apart from his interest in a class with all other citizens and creatures of the state, *which interest is not properly represented by the state*." *New Jersey* v. *New York*, 345 U.S. at 373 (emphases added). That requirement flowed from "the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens,'" for several reasons. *Id.* at 372 (quoting *Kentucky* v. *Indiana*, 281 U.S. at 173). First, treating the State as the representative of its citizens "is a necessary recognition of sovereign dignity," as it prevents the State from being "judicially impeached on matters of policy by its own subjects." *Id.* at 373. Second, the rule serves "good judicial administration," because allowing water users like Philadelphia to intervene alongside their States would leave "no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Ibid.*

b. This Court applied that "general rule" in *Nebraska* v. *Wyoming*, 515 U.S. 1, 21 (1995). In an action to enforce this Court's previous decree equitably apportioning the North Platte River, Wyoming sought permission to assert a cross-claim against the United States based on an alleged violation of the decree. Wyoming contended that individual federal reclamation contracts, allocating water held in federal storage facilities, were contrary to the decree. *Id.* at 15, 17. The Court permitted Wyoming to pursue that cross-claim, over the United States' objection that litigating Wyoming's theory would inevitably invite "intervention by many individual storage contractors" in the original action. *Id.* at 21.

The Court explained that the nature of an equitable-apportionment action would make such participation both unnecessary and inappropriate under the Court's longstanding rule:

> Although the claim may well require consideration of individual contracts and compliance with the Reclamation and Warren Acts, * * * [Wyoming] states a claim arising under the decree itself, one by which it seeks to vindicate its *quasi-sovereign* interests which are independent of and behind the titles of its citizens, in all the earth and air within its domain.
>
> * * * * *
>
> Ordinarily, in a suit by one State against another subject to the original jurisdiction of this Court, each State must be deemed to represent all its citizens. A State is presumed to speak in the best interests of those citizens, and requests to intervene by individual contractees may be treated under the general rule that an individual's motion for leave to intervene in this Court will be denied absent a "showing [of] some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953); cf. Fed. Rule Civ. Proc. 24(a)(2). We have said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States.

Nebraska v. *Wyoming*, 515 U.S. at 20-22 (some internal quotation marks and other citations omitted).

Under the "general rule" this Court has laid down, *Nebraska* v. *Wyoming*, 515 U.S. at 21, water users may not intervene alongside their States if their only interest is in obtaining or maintaining access to some portion of the State's equitable share of water. Those users have a personal interest only in the "intramural dispute over the distribution of water within the [State]," a dispute that the equitable-apportionment case will not address. *New Jersey* v. *New York*, 345 U.S. at 373.

Sovereign entities, by contrast, do have a valid role to play in equitable-apportionment actions. That is why Pennsylvania (but not Philadelphia) was permitted to intervene in the *New Jersey* v. *New York* litigation, and why the United States and various Indian Tribes have been permitted to join such actions as well: the water rights of the Tribes are directly at issue in the equitable apportionment. See *Arizona* v. *California*, 460 U.S. 605, 614-615 (1983).[1] Indeed, in *Arizona* v. *California*, this Court noted the Indians' special status and continued enjoyment of retained sovereignty in concluding that several Tribes could intervene even though the United States could litigate on their behalf. See *id.* at 615 & n.5. The United States likewise has its own sovereign interests at stake in water-law adjudication.

B. The Special Master's Analysis Does Not Adequately Preserve The Status Of An Equitable-Apportionment Action As A Sovereign Dispute

As South Carolina correctly explains, the Special Master's recommendation would permit *non*-sovereigns

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[1] The Tribes' water rights are specifically addressed by the decrees in that case. *E.g.*, *Arizona* v. *California*, 376 U.S. 340, 344-345 (1964).

to intervene in an equitable-apportionment action for the first time. That conclusion cannot be reconciled with *New Jersey* v. *New York* or with this Court's repeated statements that an equitable-apportionment action is a dispute between sovereigns.

1. The Special Master's attempt to synthesize a broad test for intervention, based on this Court's decisions in a wide variety of original matters, did not give sufficient weight to the heightened sovereign interests at stake in litigation of this sort. The Special Master reasoned that "original jurisdiction actions by definition implicate sovereign interests," and therefore that there must be "no special rule applicable only to equitable apportionment cases that precludes intervention by non-sovereigns." Report 24. But not every original action does, in fact, implicate sovereign interests to the same degree. To the contrary, in some original actions the State's standing to sue is premised on proprietary interests or on a pure *parens patriae* theory of injury to the State's people as a whole. See, *e.g.*, *Wyoming* v. *Oklahoma*, 502 U.S. at 450-451 (standing was based on "direct injury" to Wyoming's "severance tax revenues"); *Maryland* v. *Louisiana*, 451 U.S. 725, 738-739 (1981) (standing to challenge a state gas tax was based on harm to the plaintiff States as gas consumers and on economic injury to other consumers in those States). See generally Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 290-292 (5th ed. 2003). In those circumstances intervention has been permitted when the intervenor has a distinct injury. Compare *Maryland* v. *Louisiana*, 451 U.S. at 738-739 (concluding the States had standing based on consumer injury), with *id.* at 745 n.21 (concluding that pipeline

companies could intervene based on their "direct stake" as payers of the challenged tax).

By contrast, as discussed above, in an equitable-apportionment action, the competing States are advancing sovereign interests rather than proprietary interests or interests that derive from individual water users. That is why those disputes, unlike other types of original action, are "resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States." *Nebraska* v. *Wyoming*, 515 U.S. at 22.[2]

2. The Special Master also relied on cases in which non-sovereigns have participated as defendants *ab initio*, by being named in a plaintiff State's complaint. The Special Master concluded (Report 16) that there is no "compelling logical distinction" between joinder as a defendant and intervention. In our view, however, those

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[2] As the Special Master correctly recognized (Report 24), boundary disputes implicate "core sovereign interests"; indeed, of all the issues on the Court's original docket, interstate boundary and water questions are among those that implicate States' retained sovereignty most directly. But the Special Master incorrectly suggested that this Court has affirmatively permitted non-sovereign entities to litigate those issues. In one case presenting both boundary and land-claims issues, this Court granted (summarily and without opposition) a municipality leave to intervene, but only to address the United States' claim of *title* to certain real property. *Texas* v. *Louisiana*, 416 U.S. 965 (1974) (mem.); see *Texas* v. *Louisiana*, 426 U.S. 465, 466 (1976) (per curiam). The interests that warrant intervention in a title dispute are entirely distinct from those at issue in a sovereign disagreement over borders or the allocation of rivers that cross those borders. Because the United States' claim in *Texas* v. *Louisiana* was rejected by the special master and the United States took no exception, see *id.* at 466-468, this Court never had occasion to revisit the city's participation beyond its initial summary order.

instances of permissive joinder are of limited relevance to the question of intervention. At the least, merely by allowing a State to name both sovereigns and non-sovereigns in its complaint, this Court did not signal any departure from the general rule on *intervention* laid down in *New Jersey* v. *New York* and reaffirmed in *Nebraska* v. *Wyoming*. Indeed, in *New Jersey* v. *New York* itself, this Court distinguished between the City of New York (which was properly joined as a defendant in New Jersey's bill of complaint) and the City of Philadelphia (which was denied leave to intervene because it was represented by Pennsylvania). 345 U.S. at 374-375.

The Special Master discerned from the joinder cases a principle that "a citizen of a party state may properly become a party in an original action * * * where non-incidental relief is sought against it by the plaintiff." Report 18-19. But that principle, however accurately it may describe the holdings of joinder cases, has no application to the intervention of a new defendant, against whom (by definition) the plaintiff has sought *no* relief. The would-be intervenor's willingness to subject itself to some form of relief (if the plaintiff prevails) is not enough to justify intervention. Cf. Fed. R. Civ. P. 24(a)(2) (intervention may be denied if "existing parties adequately represent [the would-be intervenor's] interest" in the litigation, even if the intervenor might have been a proper defendant).

To be sure, in some cases a plaintiff may be not just permitted but *required* to join a particular entity as a defendant, to permit a proper resolution of the plaintiff's claim. Cf. Fed. R. Civ. P. 19(b) (failure to join an indispensable party). But none of the cases on which the Special Master relied examined whether the named defendant was indispensable. Moreover, this Court has

rejected the notion that particular *water users* can be indispensable parties to an equitable apportionment. For example, because an individual water user in Wyoming "must obtain permits and priorities for the use of water from the state of Wyoming," which in turn comes from Wyoming's equitable share, the Court has recognized that the user's "rights can rise no higher than those of Wyoming, and an adjudication of [Wyoming's] rights will necessarily bind him." *Nebraska* v. *Wyoming*, 295 U.S. 40, 43 (1935) (denying the Secretary of the Interior leave to intervene because his asserted interest was that of an individual water user). "He is not a necessary party" to the equitable apportionment, the Court concluded, because "Wyoming will stand in judgment for him." *Ibid.*; cf. *United States* v. *Louisiana*, 339 U.S. 699, 701-702 (1950) (lessees were not indispensable parties to a suit between the United States and a State over title to lands including the leaseholds).

For similar reasons, even if the cases in which States have decided to join non-sovereigns as defendants were relevant, they would offer no support for the Special Master's conclusion here (Report 22-23). A State that seeks only the equitable apportionment of an interstate river is not seeking "non-incidental relief" against a user of river water in another State.

C. Relaxing The Standard To Permit Intervention Here Would Have A Significant Practical Impact On Equitable-Apportionment Adjudications

On the current record, none of the proposed intervenors appears to have made a sufficient showing of "some compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly repre-

sented by the state." *New Jersey* v. *New York*, 345 U.S. at 373; see S.C. Br. in Supp. of Exceptions 38-55. Each of the proposed intervenors traces its interest in this action to its interest in the waters of the Catawba.[3] And even if the equitable apportionment of the Catawba reduces North Carolina's share of water, the impact of that reduction on North Carolina water users (including the proposed intervenors) will depend on how state-law water rights and uses are allocated. The proposed intervenors may well have a stake in the ensuing "intramural dispute," but their interests in the apportionment are represented by their States. *New Jersey* v. *New York*, 345 U.S. at 373.

Although the focus of the complaint is on certain interbasin transfers, South Carolina complains generally that the totality of uses in North Carolina, and certainly the totality of interbasin transfers, are causing the alleged shortages in South Carolina's putative share of the Catawba. All water users in North Carolina have inter-

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[3] Duke has acknowledged that its property interest in the waters that it impounds are not a sufficient basis for intervention. Duke Reply in Supp. of Mot. to Intervene 10 n.4. Rather, Duke contends that any equitable apportionment must take into account the terms of Duke's CRA. *E.g.*, *id.* at 11. But Duke need not become a party for the Court or the Special Master to become aware of what its CRA would require (if accepted by FERC); indeed, both North Carolina and South Carolina are signatories to the CRA, and Duke remains able to provide any relevant information and even argument through third-party discovery or as an amicus curiae. And so long as the terms of the CRA are taken into account in the equitable apportionment, the mere fact that Duke impounds and releases the waters being apportioned does not give Duke a sufficiently concrete interest in the outcome of the apportionment. See *id.* at 11-12; cf. S.C. Br. in Supp. of Exceptions 22-23 (noting a previous special master's conclusion that a FERC license was an insufficient basis to justify intervention).

ests that are potentially affected by the relief sought against their sovereign. Thus, the proposed rule raises the specter of wide-scale intervention by individual water users.

Such an outcome would have a negative effect on equitable-apportionment proceedings.[4] See *New Jersey* v. *New York*, 345 U.S. at 372-373. First, such a relaxation could potentially involve the Court in the resolution of intramural water disputes on the scale of a state-wide general stream adjudication. Second, even assuming that these actions could be *litigated* manageably with a significantly expanded number of parties, the expansion would make it significantly less likely that any of these cases could be *settled*. As this Court has admonished, interstate water disputes "should, if possible, be the medium of settlement, instead of invocation of [this Court's] adjudicatory power." *Colorado* v. *Kansas*, 320 U.S. 383, 392 (1943); see *Hinderlider*, 304 U.S. at 105-106 & n.11. The participation of more parties,

[4] The Special Master suggested that this problem is not implicated here, because Charlotte (for example) is "one of the recipients of the three interbasin transfers that South Carolina identifies in its Complaint." Report 25. But South Carolina's basic complaint is that North Carolina is using more of the Catawba than its equitable share. Its prayer for relief seeks to enjoin aggregate uses that exceed North Carolina's apportioned share, and does not seek to enjoin interbasin transfers as such. Compl. 10; see also S.C. Br. in Supp. of Exceptions 41-44. Thus, the outcome of any equitable apportionment will not necessarily curtail any transfers to Charlotte; which users will be affected is entirely a question of state law. Charlotte and CRWSP were noted in the complaint as large water users, but even heavy water consumption was inadequate to justify Philadelphia's intervention in *New Jersey* v. *New York*. See 345 U.S. at 373 & n.*. And Charlotte and CRWSP did not acquire a unique interest merely because South Carolina cited their interbasin transfers as manifestations of the broader problem about which it is complaining.

particularly parties that advance a narrower and more parochial interest than the State litigants, can only impede that goal.

In particular, in this case the Special Master made clear that each proposed intervenor would be permitted to intervene in both the liability and remedial phases of the litigation, subject to potential limitations (not yet identified or imposed) as to issues that "do not affect the intervenor." Report 34. As a result, those intervenors presumably have a full opportunity to object to any settlement that implicates their asserted interest in the interstate apportionment of the waters, even if they might not have a power to block such a settlement by withholding their consent. See *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 529 (1986).

CONCLUSION

South Carolina's exceptions to the First Interim Report of the Special Master should be sustained, and the motions for leave to intervene should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

CATAWBA RIVER WATER SUPPLY PROJECT;
CITY OF CHARLOTTE, N.C.; AND
DUKE ENERGY CAROLINAS, LLC,

Intervenors.

On Exceptions to the
First Interim Report of the Special Master

REPLY OF CATAWBA RIVER WATER SUPPLY PROJECT TO EXCEPTIONS OF SOUTH CAROLINA TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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QUESTION PRESENTED

In this original action, South Carolina seeks an equitable apportionment of the Catawba River, including an injunction against an ongoing interbasin transfer of water by Catawba River Water Supply Project (CRWSP), which is a bi-state entity supplying water to both North and South Carolina. In the suit, neither state will represent CRWSP's interests because each has a significant incentive to limit CRWSP's water deliveries to the other.

The Question Presented is:

Did the Special Master err in recommending that CRWSP be permitted to intervene for the limited purpose of protecting its interests?

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REPLY OF CATAWBA RIVER WATER SUPPLY PROJECT TO EXCEPTIONS OF SOUTH CAROLINA TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

The Catawba River Water Supply Project (CRWSP) respectfully replies to South Carolina's Exceptions to the First Interim Report (Report) of the Special Master, which correctly recommends that CRWSP be permitted to intervene for the limited purpose of defending against an equitable apportionment and injunction that South Carolina seeks against CRWSP.

SUMMARY OF THE ARGUMENT

This Court's precedents balance a putative intervenor's compelling interest in the outcome of an original action against the prospect that the party states will represent that interest and the concern that intervention would render the litigation unmanageable. The Court has rejected intervention by a municipality that sought only to protect its interest in the consumption of water. *New Jersey v. New York*, 345 U.S. 369 (1953) (per curiam). Conversely, it has permitted intervention by a municipality that claimed a property right in disputed lands (*Texas v. Louisiana*, 426 U.S. 465 (1976)), and by taxpayers who agreed with the party states that a state tax was unlawful (*Maryland v. Louisiana*, 451 U.S. 725 (1981)). In a closely analogous case on which South Carolina heavily relies, the Special Master permitted the intervention of a bi-state utility because the party states were conflicted in their advocacy of the utility's water withdrawals. Seventeenth Memorandum of Special Master, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 2, 1999).

The Special Master properly recommended that CRWSP be permitted to intervene in order to protect its "compelling interest" in the outcome of this case, given that CRWSP is no "mere user" of the Catawba River. CRWSP is a joint venture between units of local government in South Carolina and North Carolina. It operates a plant located in South Carolina that treats and distributes water from the River to roughly 100,000 individuals in each state. CRWSP's distribution includes millions of gallons per day of "interbasin transfer" to Union County, North

Carolina. CRWSP sought to intervene because South Carolina's Complaint seeks an equitable apportionment of the River and an injunction against that transfer by CRWSP.

The Special Master correctly recognized that CRWSP's interest in the outcome of the case is manifest. South Carolina specifically requests that this Court enter an order blocking an essential aspect of CRWSP's operations. An equitable apportionment decree also may specify that other withdrawals from or discharges into the River take priority over CRWSP's use. The forced reduction of CRWSP's water withdrawal sought by South Carolina would threaten CRWSP's ability to serve the citizens of *both* states by significantly reducing the revenues that sustain its operation.

Contrary to South Carolina's invocation of the principle of *parens patriae*, neither party state can or will represent CRWSP's compelling interest in maintaining its withdrawal of water from the Catawba River. Both South Carolina and North Carolina are heavily conflicted in their view of CRWSP's operations. South Carolina is obviously hostile to CRWSP's withdrawals of water for the benefit of North Carolina residents. Conversely, North Carolina has every incentive to seek an apportionment that would reduce CRWSP's withdrawals of millions of gallons per day for consumption in South Carolina. Even North Carolina's interest in defending CRWSP's North Carolina IBT is heavily compromised by its interest in maximizing the flow of the River north of the border and minimizing withdrawals in South Carolina.

The Special Master was attentive to concerns about the ability to administer this litigation and, at CRWSP's urging, recommended that intervention be allowed for the "limited purpose" of protecting its own interest in the outcome of the case. CRWSP is entitled to participate in order to develop and present facts relating to its operations. The Special Master's view that CRWSP's participation in that role would aid her resolution of the case should be afforded considerable deference. There is moreover no prospect that the case will devolve into an "intramural" dispute between CRWSP and other parties over the allocation of water within the states.

This Court accordingly should adopt the recommendation of the Special Master that CRWSP be permitted to intervene.

ARGUMENT

I. CRWSP's Bi-State Joint Venture

CRWSP is a bi-state entity – a joint venture created by Union County, North Carolina (UC-NC) and Lancaster County Water and Sewer District (LCWSD-SC), which is a unit of South Carolina local government. CRWSP was created principally to supply water to the rapidly growing, bi-state metropolitan population around Charlotte. UC-NC is North Carolina's fastest growing county, while Lancaster County's panhandle region is among South Carolina's most rapidly expanding areas.

During the 1980s, it became apparent that this bi-state area's water demand could not be fulfilled by sources other than the Catawba. In North Carolina, it was not economical to transfer water from the

Yadkin-Pee Dee and Rocky Rivers to population centers far to their west. In South Carolina, LCWSD-SC could not rely on its prior water source (Bear Creek) in light of burgeoning demand and significant water quality concerns.

Regulatory authorities in both states encouraged UC-NC and LCWSD-SC to join together and create CRWSP to advance the spirit of regionalism; to minimize the proliferation of water intakes along the Catawba River; and to spread the ever-rising costs of water treatment across a larger customer base, thereby reducing the cost of water to customers.

LCWSD-SC and UC-NC accordingly formed CRWSP to construct and operate a water treatment and distribution plant located in Lancaster County, South Carolina. In recognition of the dual-state nature of its obligations, CRWSP's advisory board is composed of representatives from both units of government. The boards of LCWSD-SC and UC-NC ultimately make the decisions that bind CRWSP. CRWSP has its own budget, revenues, expenses, assets and staff. It charges both joint venturers for their respective water purchases, using revenues to fund ongoing operations. CRWSP is a break-even undertaking, with any surplus used to defray the next year's expenses and any shortfall funded equally by LCWSD-SC and UC-NC.

CRWSP has invested more than $30 million in its water plant and related infrastructure, in addition to the infrastructure costs of the individual joint venture participants. The water plant and related infrastructure are owned by LCWSD-SC and UC-NC as tenants in common. To finance the joint venture, UC-NC has borrowed more than $7 million in general

obligation debt and in excess of $8 million in revenue debt. UC-NC has invested many millions more to extend a water line approximately eight miles across Lancaster County to a point of connection with its infrastructure in North Carolina (which is many miles east of the Catawba River). For its part, LCWSD-SC has incurred nearly $16 million in revenue debt.

The plant commenced operations in April 1993. It withdraws water from the Catawba River at a point approximately twenty-eight miles south of where the River crosses into South Carolina. Under normal flow conditions, CRWSP distributes an average of 9 MGD to LCWSD-SC, which is used to provide retail and wholesale water to nearly 30,000 customers (roughly 90,000 individual residents) in Chesterfield, Kershaw, and Lancaster Counties, in South Carolina, as well as an obligation to serve certain customers in Mecklenburg County, North Carolina. CRWSP distributes a further 12 MGD to UC-NC to provide retail service to nearly 37,000 customers (roughly 100,000 residents). At peak demand under normal flow conditions, CRWSP approaches full utilization of its current permit to operate, which is 36 MGD.

Though CRWSP's plant is physically located in South Carolina, it is regulated by both states. South Carolina has licensed CRWSP to withdraw 100 MGD from the Catawba, and permitted CRWSP to operate its plant at 36 MGD, which is the second-largest water treatment operation along the River. South Carolina's withdrawal authorization includes 20 MGD of permitted "interbasin transfer." An "IBT" is the forced movement of water from one river basin to

another. Of that 20 MGD of IBT, LCWSD-SC uses approximately 2 MGD; UC-NC uses 5 MGD; and the remaining 13 MGD is not utilized at this time. South Carolina (through its Department of Health and Environmental Control) has also granted permits for CRWSP to connect to the water distribution systems of LCWSD-SC and UC-NC.

North Carolina (through its Department of Environment and Natural Resources) granted a parallel permit for CRWSP to connect to UC-NC's system. North Carolina has also authorized an IBT by UC-NC of 5 MGD to move water to the east of the Catawba River basin, by "grandfathering" certain IBTs that were commenced prior to the enactment in 1991 of a statute governing IBTs. North Carolina has also permitted UC-NC to deliver water from CRWSP through UC-NC's distribution system in North Carolina to customers of UC-NC.

II. The Special Master Correctly Concluded That CRWSP Has A Compelling Interest In Intervening In This Action

The Special Master properly concluded that "CRWSP has a compelling interest in defending its ability to execute the transfer challenged by South Carolina and should be allowed to intervene for that limited purpose." Report 28. CRWSP has a significant and concrete interest in the outcome of this case that cannot be trivialized as that of a mere user of the Catawba River.

There is no dispute that CRWSP has a direct interest in preventing such a decree – whether favoring South Carolina or North Carolina – which would severely disrupt CRWSP's ongoing operations

and financial health. The joint venture incurs considerable operational costs that are spread over the revenue from the sale of water to both UC-NC and LCWSD-SC. Each joint venturer is responsible through its water purchase for one-half of the joint venture's cost of operations. CRWSP is not a profitable venture; it intentionally operates on a break-even budget. CRWSP has zero margin to accommodate net losses. A decree or injunction ordering CRWSP to reduce materially its water sales to either joint venturer (or both) would cause costs to be spread over fewer customers resulting in substantial rate increases, thereby endangering CRWSP's viability and its ability to supply the affordable water that it has provided for nearly two decades to the hundreds of thousands of customers who depend on it.

a. South Carolina's Complaint Specifically Targets North Carolina's IBT

South Carolina's Complaint specifically seeks to enjoin a substantial element of CRWSP's operations – the presently authorized 5 MGD IBT to UC-NC. Such an injunction would run directly against CRWSP, which is the entity that in fact withdraws water from the River and transfers it to UC-NC.

South Carolina argues to the contrary that its Complaint does not target IBTs and certainly does not seek an injunction against CRWSP's operations. South Carolina asserts that, although the Complaint does discuss IBTs, it does so merely as an "obvious example[] of North Carolina's over-consumption." Exceptions of the State of South Carolina to First Interim Report of the Special Master and Brief in

Support of Exceptions (S.C. Exceptions Br. or Br.) 6. South Carolina further maintains that "[t]he Complaint does not request, however, that any particular transfer be restrained, which is an *intra*state matter for North Carolina to determine consistent with its equitable share of the River." *Id.* South Carolina rests its position on the proposition that equitable apportionment "cases concern the federal law of apportionment of water *between* States, not the state-law questions of how water is allocated among competing interests *within* the State." *Id.* 14 (emphases in original).

As the Special Master recognized, South Carolina's assertions significantly misstate the contents of its Complaint, including the relief it seeks, as well as the nature of relief in equitable apportionment cases. The Complaint specifically targets North Carolina IBTs, which are not mere "examples" but instead the essence of South Carolina's claim that equitable apportionment is required. The Complaint alleges that current "interbasin transfer[s]" "exceed North Carolina's equitable share of the Catawba River." Compl. ¶¶ 3-4. The Complaint then devotes an entire section to "North Carolina's *unlawful* authorization of transfers from the Catawba River." *Id.* ¶¶ 18-25 (capitalization omitted from heading) (emphasis added). South Carolina specifically alleges these IBTs are "in excess of North Carolina's equitable share of the Catawba River" because they "necessarily reduce the amount of water available to flow into South Carolina" and "exacerbate the existing natural conditions and droughts that

contribute to low flow conditions in South Carolina and cause the harms detailed above." *Id.* ¶ 24.

South Carolina's briefing shows its near-exclusive focus on its request that this Court invalidate North Carolina's IBTs as inequitable. The Question Presented stated by South Carolina's brief in support of its Motion for leave to file a bill of complaint is: "Whether North Carolina's interbasin transfer statute is invalid" because it authorizes transfers "in excess of [North Carolina's] equitable share of the waters of [the Catawba] [R]iver." Br. of S.C. in Support of Motion for Leave to File Complaint (S.C. Complaint Br.) The first sentence of its Reply Brief is that "North Carolina's inequitable interbasin transfers of water out of the Catawba River Basin have caused – and continue to threaten – substantial harm to South Carolina during periods when the Catawba River is at less than adequate flows." Reply in Support of Request to File Complaint 1.

Given the foregoing, the Special Master properly concluded that "a fair reading of South Carolina's Complaint and other papers, including its preliminary injunction motion, shows that interbasin transfers are not merely 'mentioned,' but are the primary if not exclusive means by which South Carolina claims to have been harmed." Report 38. "South Carolina alleges that these interbasin transfers from the Catawba have reduced the amount of water flowing into South Carolina and exacerbated the existing natural conditions and droughts that cause low flow conditions in South Carolina." *Id.* 6.

b. South Carolina's Complaint Seeks An Injunction Against Particular IBTs

South Carolina equally mischaracterizes the relief sought by the Complaint, which in fact affirmatively seeks an injunction against IBTs. South Carolina asks this Court "to enjoin North Carolina from authorizing past or future [interbasin] transfers inconsistent with [an equitable] apportionment." Compl. ¶ 4. Its prayer for relief requests an Order "enjoining North Carolina from authorizing transfers of water from the Catawba River, past or future, inconsistent with [an equitable] apportionment, and also declaring that the North Carolina interbasin transfer statute is invalid to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment as determined by this Court's decree." *Id.* 10.

Again, South Carolina's briefing reinforces the plain terms of its pleadings. In seeking leave to file its bill of complaint, South Carolina devoted an entire section of its brief to the proposition that "North Carolina should be enjoined from authorizing transfers from the river that are inconstant with [the equitable] apportionment." S.C. Complaint Br. 11. South Carolina explained that it sought an order "declaring North Carolina's interbasin statute invalid with respect to inequitable transfers out of the Catawba River, and *prohibiting* all transfers by North Carolina – past and future – that are inconsistent with that apportionment." *Id.* 9 (emphasis added). In opposition to CRWSP's intervention, South Carolina again reaffirmed its "alleg[ation] that North Carolina has taken and is taking more than its fair share of the river waters,

through a series of interbasin water transfers from the Catawba River" and reiterated its requests that this Court should equitably apportion the River and "enjoin" IBTs that are, according to the allegations of the Complaint, beyond North Carolina's equitable apportionment. Br. in Opp. to CRWSP Intervention 1.

South Carolina also has no explanation for why, in filing the Complaint, it also sought "a preliminary injunction that would have prevented North Carolina from authorizing additional transfers during the pendency of this litigation." S.C. Exceptions Br. 43 n.31. By definition, South Carolina could seek that form of "preliminary" relief only if it would equally have been included within the "permanent" injunction sought by the Complaint.

c. South Carolina's Requested Injunction Is Directed At CRWSP's IBT For UC-NC

The Complaint specifically identifies CRWSP's 5 MGD of IBT to UC-NC as inequitable and thus the subject of its request for an injunction. As the Special Master recognized, "the focus of South Carolina's Complaint is the North Carolina interbasin transfer statute and a small number of authorizations granted under that statute for transfers of water from the Catawba." Report 22. In discussing inequitable water uses, the Complaint explains that North Carolina law "grandfathers the transfer by Union County of at least 5 million gallons per day from the Catawba River Basin." Compl. ¶ 21. *Contra* S.C. Exceptions Br. 5-9, 42 (acknowledging that the Complaint addresses "two recent approved transfers and one requested transfer," but omitting

the Complaint's discussion of CRWSP's IBT). The Complaint identifies "an existing authorization to Union County to transfer at least 5 million gallons [of water] per day" (Report 5) and alleges "that *these interbasin transfers* from the Catawba have reduced the amount of water flowing into South Carolina and exacerbated the existing natural conditions and droughts that cause low flow conditions in South Carolina" and "are in excess of North Carolina's equitable share of the Catawba River" (*id.* 6 (emphasis added)).

Also relevant is the Complaint's allegation that the Bowater Pulp and Paper Mill has suffered inequitably low water flows. Compl. ¶ 17(d); *see also* S.C. Exceptions Br. 4 ("Bowater pulp and paper mill, for instance, paid more than $6,000 per day because the decreased water flow was insufficient to assimilate its treated wastewater consistent with state permits"). The Complaint is thus fairly understood as alleging that the availability of sufficient water for the Bowater facility is one measure of an equitable apportionment of the Catawba River. Of particular note, CRWSP's water intake is just upstream of Bowater's discharge point. South Carolina's attempt to ensure that additional flows are available to assimilate discharge from the Bowater facility necessarily implies a direct interest in significantly reducing CRWSP's adjacent upstream withdrawals.

South Carolina's attempt to suggest that its suit does not seek to define the scope of CRWSP's particular water use is also belied by its conduct in the litigation. During the last nine months that CRWSP has been in this case, South Carolina has

issued comprehensive discovery requests regarding CRWSP's operations. South Carolina has demanded that CRWSP produce a list of witnesses with knowledge about the allegations in the Complaint against CRWSP and the defenses of CRWSP against South Carolina, with six of the seven questions seeking information about UC-NC's IBT. South Carolina has also propounded twenty-three separate document requests upon CRWSP, of which eleven specifically pertain to the IBT of CRWSP, including UC-NC's IBT, and the remaining twelve are unique to CRWSP's use and location.

If South Carolina were just seeking a declaration that North Carolina was taking an inequitable share of the Catawba, as opposed to a determination that CRWSP's IBT to UC-NC is inequitable and should be enjoined, much of that effort would be unnecessary. It is instead evident that South Carolina is attempting to prove that CRWSP, particularly through its support of consumption by UC-NC in North Carolina, is harming other South Carolina uses of the River. Inexplicably, South Carolina has sued, in part, over a governmental unit in North Carolina reducing water rates in several areas in South Carolina, in return for flow in the River, from which certain South Carolina citizenry benefit immensely, and all of which South Carolina has approved.

Of particular note, in seeking to enjoin UC-NC's IBT, South Carolina does not target CRWSP as an "agent" of North Carolina, which does not in any respect direct CRWSP's operations. Rather, North Carolina has merely authorized the IBT as consistent

with state law. Nor does South Carolina target CRWSP as an "agent" of South Carolina either.

The Special Master also correctly rejected South Carolina's "theory" that "any decree by the Court would simply limit North Carolina to a fixed amount of water that North Carolina could allocate to uses within the state—thus rendering irrelevant any consideration of particular existing uses by the Intervenors or other users," recognizing that there was "no precedent supporting such a narrow conception of the apportionment inquiry." Report 35. To the contrary, this Court's practice is to "engag[e] in a detailed consideration of existing uses and other conditions as part of an equitable apportionment analysis." *Id.*

South Carolina cites the Special Master's Eighth Case Management Order (CMO No. 8) to argue that "the Special Master has concluded" that "South Carolina's Complaint does not seek to enjoin any particular transfer" because it "prays for a decree equitably apportioning the Catawba River and enjoining *any and all* withdrawals from the River in excess of North Carolina's equitable share." S.C. Exceptions Br. 43 (emphasis in original). This is an attempt to make a silk purse of the sow's ear that the Complaint seeks to enjoin *more* IBTs than just CRWSP's. The Special Master recognized, at that stage of the proceedings, that she would construe the Complaint broadly and not *limit* South Carolina in discovery as if it merely requested that particular IBTs would be enjoined. But the Special Master clearly understood and believed that South Carolina seeks an injunction against CRWSP's IBT. She reiterated that the Complaint "alleges that these

interbasin transfers from the Catawba" are "'in excess of North Carolina's equitable share'" and "seeks a decree 'enjoining North Carolina from authorizing transfers of water from the Catawba River, past or future, inconsistent with that [equitable] apportionment.'" CMO No. 8, at 3 (quoting Compl. 10 & ¶¶ 4, 24).

d. Beyond South Carolina's Specific Request For Injunctive Relief, Its Request To Equitably Apportion The Catawba River May Result In Limits On Particular Water Users

This Court's rulings confirm that, consistent with the allegations of South Carolina's Complaint, the decree in an equitable apportionment case regularly specifies the lawfulness of particular intra-state water uses. South Carolina's attempt to suggest that the decree could do no more than allocate some water to itself and the remainder to North Carolina, and would not define CRWSP's rights, is thus unfounded. *Contra* U.S. Br. 11 (asserting that in equitable apportionment actions, "the Court determines the *overall* share of water to be allocated to each State, and state law then determines how that share is to be allocated among individual water users" (emphasis in original)); *id.* 20.

Wyoming v. Colorado illustrates why South Carolina is incorrect. The Court's decree in that case did not merely specify Colorado's entitlement to water. Rather, it awarded 18,000 acre-feet to Skyline Ditch; 15,500 acre-feet to the Laramie-Poudre Project (which diverted water from the Laramie River to the Poudre watershed); 4,250 acre-feet to certain

meadowland irrigation; and 2,000 acre-feet to the Wilson Supply Ditch. *Wyoming v. Colorado*, 298 U.S. 573, 579 (1936) ("the Colorado claims which the decree recognizes and confirms are the only ones [that] may be made as against Wyoming and her appropriators").

Nebraska v. Wyoming demonstrates the same point. There, the decree did not merely allocate water among the states (325 U.S. 665, 667 (1945)) – it also defined the relative priority of four Wyoming reservoirs and specified the rates of diversion for five Nebraska appropriators (*id.* at 666-67).

Indeed, even in the course of opposing CRWSP's intervention, South Carolina has stressed that, wholly apart from any particular injunction, the ruling it seeks will circumscribe the rights of CRWSP to withdraw water from the Catawba River:

> This Court has made clear, however, that allocations *within a state* are necessarily constrained by the apportionment decrees dividing water *between States*. *See Hinderlider*, 304 U.S. at 106 (holding that an "apportionment [by this Court] is binding upon the citizens of each state and all water claimants," even where the State had previously allocated state-law water rights among individual claimants); *see also Nebraska v. Wyoming*, 515 U.S. at 22. Thus, as to the equitable share between the party States, municipalities' rights – regardless of their authority granted under state law – "can rise no higher than those of [the party State], and an adjudication of the [State's] rights will necessarily bind [them]." *Nebraska v. Wyoming*, 295 U.S. at 43

S.C. Br. in Opp. to CRWSP Intervention 4-5. And even to the extent that a state could later reallocate these intra-state rights in certain cases, the relevant point is that the Court's decree would define them in the first instance.

Thus, even if this Court denies South Carolina's request for an injunction, it is easy to conceive of other respects in which this Court's decree will directly affect CRWSP. An emerging theme of South Carolina's position in this litigation goes well beyond IBT to allege that North Carolina's water use from the Catawba generally should be curtailed in times of low flow. Any such mandated conservation would raise a direct question regarding UC-NC's water consumption from CRWSP. Alternatively, the Court could favor North Carolina's position and conclude that CRWSP's withdrawals for South Carolina residents are inequitable and should be reduced. In any of these scenarios, there is every prospect that this Court's decree will specify CRWSP's permitted volume of water consumption.

In sum, South Carolina's bald assertion that "CRWSP's interest in water consumption (in either States) are far from unique or compelling" (S.C. Exceptions Br. 46) lacks merit and the Special Master properly concluded that CRWSP has a "compelling interest" in intervening (Report 28). The Special Master correctly refused to "conclude that interbasin transfers are not central to the Complaint (they are) or that South Carolina did not seek to enjoin the transfers to these municipalities authorized by North Carolina (it does)." Report 38.

III. The Party States Will Not Adequately Represent CRWSP's Compelling Interest In The Outcome Of This Litigation

Not only is CRWSP's interest in this litigation substantial, concrete, and immediate, but that bi-state interest will not be represented by either one of the party states. Neither South Carolina nor North Carolina will advocate in favor of CRWSP's current and anticipated uses of the Catawba River, because each party state has a significant interest in limiting one aspect of CRWSP's operation – *viz.*, the withdrawals for residents of the other state.

Nor will either state's failure to promote vigorously CRWSP's position result from the state's own "intramural" decision about how the Catawba's waters should be divided within state borders. Rather, each state's adversity towards the other inevitably carries with it an adversity to an important component of CRWSP's apportionment of the River. Given that South Carolina is seeking to reduce North Carolina's water withdrawals, it is no wonder North Carolina is presently disinclined to champion unqualifiedly North Carolina local government withdrawals from South Carolina. The conflicts between CRWSP and the party states are thus *inter*mural and a proper basis for intervention in this Court. There is accordingly no merit to South Carolina's assertion (S.C. Exceptions Br. 45) that the Special Master "ignore[d]" that "CRWSP's interests are adequately represented by the party States."

On the one hand, South Carolina is obviously hostile to CRWSP's interests. Not only does South Carolina seek an injunction against CRWSP's

transfer of water to UC-NC for 5 MGD of IBT (*see supra* at 12-16), but it has chosen the vehicle of an equitable apportionment action to seek that relief notwithstanding that it has specifically *approved* that very IBT under South Carolina law. *See supra* at 6. Indeed, South Carolina's Brief in support of its exceptions asserts that CRWSP "withdraws water on the South Carolina side of the boundary and transfers it for use on the North Carolina side" (*id.* 9), and on that basis describes CRWSP as "a stalking horse for North Carolina water users" (*id.* 46). Although that characterization omits any of CRWSP's withdrawals for the benefit of South Carolina residents (*see infra*), it helpfully captures the state's patent hostility to CRWSP's interests.

Further, as South Carolina seeks to expand the scope of its suit to challenge more broadly the lawfulness of the volume of North Carolina residents' consumption of water from the Catawba River (*i.e.*, to seek to limit all consumption, not merely IBT (*see supra*)), that shift highlights South Carolina's inability to represent CRWSP's interests. Such an expanded conception of the Complaint would attack the legality of not only UC-NC's 5 MGD of IBT but its *entire* transfer of water from CRWSP, much of which is consumed in the Catawba River Basin and therefore does not qualify as IBT.

South Carolina nonetheless asserts that it "'must be deemed to represent all its citizens,' including its political subdivisions such as LCWSD," even when the State is jeopardizing LCWSD's rate structure. S.C. Exceptions Br. 45 (quoting *New Jersey v. New York*, 345 U.S. 369, 372 (1953) (per curiam)). But the quoted language from *New Jersey v. New York* did

not hold – as South Carolina's excerpt is intended to suggest – that non-sovereigns always are represented by the states in which they are located, with the consequence that they are forbidden from ever intervening in equitable apportionment actions. Rather, the Court merely addressed the scope of the "[t]he '*parens patriae*' doctrine." 345 U.S. at 372. In determining whether intervention was permitted, the Court proceeded to consider whether the intervenor had "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.* at 373. *See infra* Part IV.

Elsewhere, South Carolina correctly recognizes that this Court's precedent "*presumes* that States act as *parens patriae* in representing the interests of all citizens of the State." S.C. Exceptions Br. 1 (emphasis added and omitted). Here, CRWSP has an interest in its own right in the outcome of this litigation that South Carolina does not represent. That interest overcomes any presumption that intervention is inappropriate because the state sufficiently represents CRWSP's interests.

On the other hand, North Carolina will not represent CRWSP's interests, and North Carolina conspicuously has never asserted that it could. South Carolina argues to the contrary that "North Carolina has stated directly that it 'has every reason to defend the IBTs that it has authorized for the benefit of its citizens.'" S.C. Exceptions Br. 45. But North Carolina made that statement with respect to Charlotte, not CRWSP's withdrawal for UC-NC. That 5 MGD of IBT originates from a plant operating

on a segment of the River within South Carolina. North Carolina, by contrast, has a significant interest in maximizing water flows above the state line, notwithstanding that less water is available to CRWSP (and hence UC-NC) as a consequence.

Even assuming North Carolina has a sufficient reason to support that particular North Carolina IBT that reason does not remotely establish that North Carolina's interests are aligned with those of CRWSP. The IBT represents only one portion of CRWSP's withdrawals. As the Special Master explained, "In total, CRWSP may draw 36 million gallons of water per day from the Catawba, and *5 of these 36 million gallons* represent the Union County [authorization] about which South Carolina complains." Report 26 (emphasis added).

Overall, roughly half of CRWSP's water withdrawals are for the benefit of South Carolina residents. This includes approximately 2 MGD of LCWSD-SC's IBT within South Carolina. The fact that this is an equitable apportionment action opens the door to claims by *North Carolina* that this Court should order reduced consumption on the South Carolina side of the border. Contrary to the contention that North Carolina will represent CRWSP, North Carolina has every interest in positioning itself adversely to CRWSP with respect to those withdrawals. In defending against an attempt to reapportion the River, North Carolina is likely to maintain that significant withdrawals within South Carolina, including IBTs there, are inequitable and should be reduced.

Conversely, CRWSP has a heightened interest in an apportionment of the Catawba River that

increases the volume of water that crosses the state line, and thus ensures more water is available in times of low flow at the point of CRWSP's intake. That interest would support limitations on withdrawals from the River in North Carolina. By contrast, as noted, North Carolina's principal interest is in advocating for an apportionment that allocates a larger proportion of water to be withdrawn before it crosses into South Carolina.

CRWSP also has a distinct interest, adverse to both States, in avoiding the entry of a decree by this Court under the doctrine of equitable apportionment. CRWSP has *state* common law riparian rights to withdraw water from the free-flowing portion of the Catawba River. *See Lowcountry Open Land Trust v. State*, 347 S.C. 96, 107, 552 S.E.2d 778, 784 (S.C. Ct. App. 2001) ("[I]n addition to those rights of the public at large, a riparian owner possesses a property right incident to his ownership of the bank and bed to the thread of the watercourse" and "[o]wners of riparian land possess rights 'relating to the water, its use [and the] ownership of soil under the [water]'" (alterations in original) (citing Black's Law Dictionary)). The principal purpose of this case, by contrast, is the entry of a decree that will announce superseding rights to the water as a matter of *federal* common law. Whichever State prevails in its efforts to secure greater water rights – South Carolina or North Carolina – the upshot is that CRWSP's existing property rights and ongoing rights to operate are at least threatened. Each state will thus be significantly conflicted from championing and protecting CRWSP in this controversy.

It is worth noting that the significant conflicts that exist between CRWSP and the party states are only amplified when considered in the context that this case is focused on periods of low flow in the River and the prospect of continued growth in water demand. Consumption from the River is in many respects zero-sum under those conditions. Each state accordingly has an overriding interest in exclusively pursuing its own overall water demand, to the inevitable significant detriment of CRWSP.

South Carolina lodges a straw man argument (*see* S.C. Exceptions Br. 45-46) that CRWSP's dual-state nature does not elevate it to the status of sovereign. Intervention in equitable apportionment actions is not limited to sovereigns. *See infra* Part IV. The relevant point is that neither of the sovereigns which *are* parties to the litigation will represent CRWSP's compelling interests. CRWSP accordingly has no option but to intervene to protect those interests itself.

Finally, South Carolina broadly overstates matters when it asserts (S.C. Exceptions Br. 11 n.9) that the Special Master "rejected . . . CRWSP's argument that it was entitled to intervene based on its bi-state status." In fact, the Special Master only reasoned that CRWSP's bi-state status was not "compelling, *standing alone*, as a basis for intervention." Report 27 (emphasis added). CRWSP's position is not that it is entitled to intervene merely because it is a significant water user or because it is a joint venture of governments from both states. Rather, as the Special Master found, CRWSP has a compelling interest in the

outcome of the case that the party states will not themselves represent.

IV. The Special Master Properly Recognized That CRWSP's Limited Role In The Litigation Reinforces The Conclusion That Intervention Is Appropriate

Having correctly concluded that that the party states cannot and will not represent CRWSP's compelling interests, the Special Master took care to ensure that CRWSP's intervention would only assist, not impede, the course of litigation. The Special Master recommended that intervention be granted for the "limited purpose" of CRWSP pursuing its own unique interests in the outcome of the litigation. Report 28.[1]

CRWSP is limited in its discovery and presentation of expert testimony to matters relating to its own water consumption. CRWSP could not, for example, propound interrogatories and document requests initiating its own separate factual inquiry about an issue not joined in the litigation against it, such as intramural questions relating to a distant water user's consumption from the River. Furthermore, as an additional practical matter,

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[1] *Cf.* Adv. Comm. Note, Fed. R. Civ. P. 24(a)(1) (intervention as a matter of right "may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings"); *J.B. Stringfellow, Jr. v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1 (1987) (Brennan, J., concurring) ("Even highly restrictive conditions may be appropriately placed on a permissive intervenor.").

CRWSP will have a major financial incentive arising from the cost of the litigation to limit its participation to protecting its own interests, without gratuitously expanding its role to include other unrelated questions.

South Carolina thus substantially misstates the Special Master's ruling in asserting that CRWSP was permitted to intervene "with rights [afforded] full parties." Br. 1. South Carolina nowhere acknowledges the significant constraints accompanying the recommendation that intervention be granted. The Special Master expressly rested the intervention ruling on "the simple principle, conceded by the Intervenors, that an intervenor's participation in an original case should be directed toward protecting that intervenor's interest and not as a means to litigate all aspects of the dispute, even those that do not affect the intervenor." Report 34. By contrast, a "full part[y]" (S.C. Exceptions Br. 1) such as South Carolina or North Carolina has far more expansive authority to develop factual and legal claims relating to the entire breadth of the case. CRWSP's participation is significantly more cabined.

South Carolina equally errs in stating that CRWSP argued "that the Special Master's recommendation granted them full party status in all phases of the litigation." S.C. Exceptions Br. 12. In fact, it was CRWSP that *proposed* the limits on its participation. *See, e.g.*, Oral Arg. Trans. on Motion to Intervene 53 (Mr. Goldstein) ("I think you can limit our intervention. I think that's what the Supreme Court's case law says. . . . [T]he Supreme Court is saying that you have to respect the things that you are subsidiary to the sovereign, and the sovereign

represents your interests."); *id.* ("We're here to focus on the things that directly affect us, and that's what we propose that you would hear from us about, and so that we would sort of self-condition our participation in the case on that con[straint]."); *id.* 53-54 (CRWSP is "just here to make sure that you have the benefit of their knowledge about the water and what's going on in that part of the River, and the people who get water from it, and the consequences of interbasin transfer, and somebody to stand up for their interest. They have no desire whatsoever to get more deeply involved in the case.").

By failing to appreciate CRWSP's limited role in the litigation, South Carolina understates the merits of CRWSP's motion to intervene in several respects. *First*, there is no prospect that CRWSP's participation will "transform an equitable apportionment action between two sovereign States into an intramural dispute." *Contra* S.C. Exceptions Br. 1. Despite its repeated protests that this Court's original jurisdiction is not a forum for CRWSP "to protect their water rights vis-à-vis other water users in their own State" (*id.* 24), South Carolina never illustrates how intervention in fact threatens to draw this Court into a fight over the allocation of water within either of the two party states. But in any event, the Special Master sensibly preempted any such concern by limiting CRWSP's participation to the issues related to whether its own water withdrawals should be deemed inequitable.

Second, and relatedly, CRWSP's intervention for a limited purpose substantially minimizes any burden that arises from its participation. Indeed, in taking exception to the Special Master's Report,

South Carolina does not argue at any length that intervention has unduly inconvenienced it. That argument would fail in light of the Special Master's logical conclusion – which should be afforded considerable deference – that intervention will definitely aid the speedy and accurate disposition of the case. CRWSP is positioned to provide the Special Master, the party states, and the Court with substantive, direct experience on the question of the proper apportionment of the Catawba River. CRWSP exists for the very purpose of withdrawing and distributing water from the River, which is a complicated bi-state undertaking, and it has developed tremendous expertise over the course of the past two decades, which is why it has been active in hydroelectric re-licensing, the Water Management Group for the Catawba River, and the Drought Management Advisory Group. The Attorneys General of South Carolina and North Carolina, by contrast, have no remotely equivalent role.

Relatedly, any suggestion by South Carolina that intervention will be excessively burdensome is contradicted by its parallel assertions about discovery from CRWSP if it is not allowed to intervene. South Carolina contends that the parties are perfectly capable of conducting discovery on the issues related to CRWSP's consumption. Further, it asserts that CRWSP can present its substantive arguments to the Special Master in the role of an *amicus curiae*. The upshot is that, by denying CRWSP's motion to intervene, this Court would not materially reduce the volume of litigation. It would only serve to deny CRWSP of the right to defend itself, including presenting facts and expert reports that will

materially assist the Special Master, on the allegations against it by South Carolina on a matter of profound importance to CRWSP's very existence.

Third, concomitant to its limited role, CRWSP does not seek relief against either of the party states or against any other intervenor. CRWSP does not, for example, seek a decree authorizing it to expand the volume of water available at its intake, such as by directing North Carolina to reduce its consumption and South Carolina to enhance its conservation measures upstream of CRWSP's intake. CRWSP's role is instead defensive. CRWSP has the right to controvert factually and legally any claims by the party states that CRWSP's consumption is inequitable. By contrast, in cases in which the participation of non-sovereigns is not so limited, intervention is correctly disfavored because there is the prospect that a request for relief against a state could contravene the state's immunity from suit under the Eleventh Amendment. *See* S.C. Exceptions Br. 18 n.11.

V. This Court's Precedents Establish That CRWSP's Intervention Is Appropriate

The decisions of this Court flexibly assess competing considerations in determining whether a particular request to intervene in an original action should be granted. The putative intervenor's distinct interest in the suit is balanced against the presumption that its home state will represent that interest and the prospect of wide-scale intervention that would render the litigation unmanageable. Here, the balance of those considerations tips decisively in favor of permitting CRWSP's

intervention. Each state is affirmatively hostile to various aspects of CRWSP's withdrawals from the Catawba. Further, CRWSP's unique status would not open the door to intervention by mere users of water.

1. This Court's jurisprudence on the standard governing the intervention by non-sovereigns in original actions is not extensive. In *New Jersey v. New York*, 345 U.S. 369 (1953) (per curiam), this Court considered the City of Philadelphia's motion to intervene in an original action brought by New Jersey against the State of New York and New York City over the diversion of the Delaware River. Philadelphia sought to protect its interest in the flow of the river. This Court held that a proper intervenor would show "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.* at 373. That standard, the Court explained, served a dual purpose: (i) consistent with the principle of *parens patriae*, it respected the states' "sovereign dignity" in representing their citizenry by avoiding "an intramural dispute over the distribution of water within the [state]"; and (ii) it facilitates "good judicial administration." *Id.*

Because Philadelphia's claimed right to intervention was so weak, the facts of *New Jersey v. New York* did not present the opportunity to elaborate on either the nature of the private interest or the tension between the interests of the intervenor and the party states that would justify intervention. In that case, the State of Pennsylvania had already entered the case "to protect the rights and interests

of Philadelphia and Eastern Pennsylvania." 345 U.S. at 374. Indeed, Philadelphia was "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests." *Id.* Philadelphia's position was "invariably" advanced by Pennsylvania. *Id.* Further, because Philadelphia was situated no differently than any other water user, its intervention would threaten the manageability of the case because the same rationale would open the door to intervention by innumerable cities and industrial facilities. *Id.* at 373.

Later cases have illuminated the circumstances in which intervention is appropriate. In *Texas v. Louisiana*, 426 U.S. 465 (1976), the Court considered a seaward boundary dispute among Texas, Louisiana, and the United States. The United States claimed title to islands in the Sabine River. This Court granted a motion to intervene by the City of Port Arthur, which asserted title to some of the contested island land. *Id.* at 466. Though the State of Texas was already a party to the case, this Court reasoned that the City could "intervene for the purposes of protecting its interests in the island claims of the United States." *Id.* *Contra* S.C. Exceptions Br. 33 (asserting that Port Arthur "asserted its title to the property not only against the United States, but also against the State," notwithstanding that there is no indication that the State disagreed with Port Arthur's position).[2]

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[2] *Compare Arizona v. California*, 530 U.S. 392, 419 n.6 (2000) (noting denial of intervention of association of land

Subsequently, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), eight states brought an original action against Louisiana challenging a tax imposed by Louisiana on natural gas pipelines on gas imported into that state. The states complained that the tax caused them to pay a higher price for gas. Seventeen pipeline companies sought to intervene. Though the states (as gas purchasers) and pipelines (as the taxpayors) had different "interests" that drove their participation, their claims were identical, their goal of invalidating the tax was the same, and if the states prevailed the pipelines would be entitled to refunds. Report of the Special Master, *Maryland v. Louisiana*, No. 83, Orig. 7-8 (May 14, 1980). *Contra* S.C. Exceptions Br. 35. This Court nonetheless permitted intervention. The Court reasoned that it is "not unusual to permit intervention of private parties in original actions." 451 U.S. at 745 n.21. In that case, intervention was appropriate because the pipelines had a "direct stake in the controversy" because Louisiana required them to pay the tax. *Id.* Further, participation by the pipeline companies would assist in "a full exposition of the issues." *Id.*

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leaseholders who "do not own land in the disputed area" and "make[] no claim to tile or water rights," and those whose interests will "not be impeded or impaired by the outcome of this litigation"). *Cf. Utah v. United States*, 394 U.S. 89, 92 (1969) (motion to intervene by resident of party state would have "substantial basis" if that state "sought to invoke [intervenor's] title" to disputed lands to defeat the claims of another party); *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (intervention granted to private landowners with interest in boundary dispute).

Most recently, in *Nebraska v. Wyoming*, No. 108, Orig., Nebraska sought to enforce a previous decree in an original action against Wyoming regarding the latter's upstream water use of the Laramie River. A Wyoming utility that supplied power to both states sought to intervene as a defendant. Both the utility and Wyoming maintained that the River was immune from equitable apportionment because it was fully appropriated between Wyoming and another state (Colorado). The Special Master accordingly recommended that intervention be denied because the utility "had not shown a compelling interest in its own right that would not be properly represented by Wyoming." First Interim Report of the Special Master, *Nebraska v. Wyoming*, No. 108, Orig. 12 (June 14, 1989) (citing *New Jersey v. New York*, *supra*). The utility did not contest that recommendation, which this Court accepted. 507 U.S. 584, 589-90 (1993).

But the circumstances changed, with the consequence that the interests of the utility were no longer completely aligned with those of either party state. This Court rejected the theory that the River was fully appropriated, which previously bound the utility's position with Wyoming's. *Id.* at 596-97. Wyoming also declined to defend the utility's interests entirely and "might yet have to weigh and balance competing Wyoming interests." Seventeenth Memorandum of Special Master, *Nebraska v. Wyoming*, No. 108, Orig. 3, 11-12 (Apr. 2, 1999) (*Nebraska* Intervention Order). Further, the eventual decree could adopt an "injunction against Wyoming" reflecting the shared position of Nebraska and the utility regarding certain water releases, and

"Wyoming can hardly be put in the position of presenting evidence to support an injunction against itself." *Id.* 12.

For its part, Nebraska argued that the utility's water use should count against Wyoming's apportionment and sought to require additional water releases from the utility's impoundment. The Special Master also recognized that "it would be unusual, to say the least, for one state to act as *parens patriae* over another state's citizen." *Id.* 11.

In response to these developments, the Special Master concluded that neither party state would fully defend the utility's interest and granted the utility's renewed motion to intervene "for the limited purpose of protecting its [individual] rights." *Id.* 10. The Special Master recognized that "the policy considerations that limit private-party participation in original proceedings do not come into play in a situation like this where [the private party] enters the case for a limited purpose and has no appropriate *parens patriae*." *Id.* 13. *Contra* S.C. Exceptions Br. 22, 37 & n.28 (extensively relying on denial of utility's motion to intervene, without acknowledging Special Master's subsequent order granting intervention).

The line from *New Jersey v. New York* to *Nebraska v. Wyoming* illustrates that a private party's request to intervene in an original action implicates competing considerations. Favoring intervention is the fact that the decree may bind the putative intervenor and have tremendous implications for its rights and interests. Disfavoring intervention are the facts that sovereign states are presumed to represent their citizens (and thus to

sufficiently protect those private interests) and that wide-scale intervention would threaten the manageability of the litigation of original matters.

The outcome of the particular cases reflects the balance of those competing considerations on the facts of each. In *New Jersey v. New York*, the City of Philadelphia asserted only the interest of a large water user, which was already protected by the participation of Pennsylvania and which did not differentiate the City from innumerable other potential intervenors.

By contrast, in the Court's subsequent cases, the putative intervenor had a significant, unique interest in the litigation. Intervention was accordingly permitted. In *Texas v. Louisiana*, though the State of Texas was a party, one of its constituent municipalities (the City of Port Arthur) was permitted to intervene to assert title to disputed property. Similarly, in *Maryland v. Louisiana*, although several states participated in the case, individual pipeline companies which paid the tax at issue in the litigation were permitted to intervene. In *Nebraska v. Wyoming*, intervention was permitted by a utility that functioned as a bi-state entity and faced competing demands by the party states on its water uses. The common elements of those three rulings were that, in each, the intervenor's interest was personal to itself and distinct from that of other citizens.

As the Special Master recognized, this Court notably has not limited intervention to circumstances in which there was a "conflict of interest or some other disabling factor that would prevent the party state from representing the proposed intervenor's

interests." Report 23. Rather, intervention has been permitted when the facts showed that the party states would not fully and effectively represent the intervenor's interests. In *Texas v. Louisiana*, the State of Texas could represent the interests of its citizens and sub-units of government. In *Maryland v. Louisiana*, the states pursued the identical claim as the pipelines and it was acknowledged that (if the claim succeeded) the Court's eventual decree would confer on the pipelines a right to a refund. By contrast, the City of Philadelphia could not identify "a single concrete consideration" in which Pennsylvania failed to represent its interests. 345 U.S. at 374. *See also* Report 14-16 (noting that the same conclusion is supported by decisions permitting private parties to be named as party defendants in original actions).[3]

Nor is there merit to the Solicitor General's contention that the standard governing intervention in equitable apportionment suits (such as *New Jersey*

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[3] The Special Master was attentive to the principle that intervention is appropriate only when the party states will not represent the putative intervenor's interests. Report 13, 23 (citing *New Jersey v. New York*, 345 U.S. at 373). After careful study of this Court's precedents, the Special Master recognized that in a particular case a state's representation may not be fully adequate, notwithstanding the absence of a disabling conflict of interest, when the intervenor (i) is the "instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief," (ii) has "an independent property interest that is directly implicated by the original dispute or is a substantial factor in the dispute," or (iii) has "a 'direct stake' in the outcome of the action." Report 21.

v. New York) is more rigorous than that applicable to other original actions governing, for example, property rights (such as *Texas v. Louisiana*). *See* U.S. Br. 15-17. The Special Master properly rejected the assertion that there is a "special rule applicable only to equitable apportionment cases." Report 24. The Court's solicitude for a state's sovereign interests and its concern for the manageability of original actions is equivalent in both contexts.

The Solicitor General theorizes that in equitable apportionment actions the state acts as sovereign on behalf of its citizens who are, as a consequence, bound by the decree. It is undisputed that no decision of this Court has ever articulated distinct standards for intervention *or* otherwise adopted that rationale. Nor does South Carolina even embrace such a distinction. That is not surprising. The *parens patriae* doctrine applies equally, and the state functions as a sovereign, in all original actions. *E.g.*, *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 593, 600-08 (1982) (State has a quasi-sovereign interest "in the health and well-being – both physical and economic – of its residents in general"); *Pennsylvania v. West Virginia*, 262 U.S. 553, 595 (1923) (holding that Pennsylvania might sue to enjoin restraints on the commercial flow of natural gas and that in suing it protected a twofold interest – one as a proprietor, and the other as the representative of its citizens). Individual citizens are equally bound when the state litigates in a propriety role as when it pursues an equitable apportionment. *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979) (private parties were "citizens of the State of Washington, which was

a party to" prior litigation over fishing rights under a treaty, and "they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and like it, were bound by the judgment").

2. CRWSP satisfies the standard for intervention set out by this Court's precedents. CRWSP's "compelling interest" in the outcome of this case (Report 28), which will determine CRWSP's ability to draw water from the Catawba River and distribute it to its joint venture participants, is beyond serious dispute. Indeed, South Carolina seeks an injunction against a significant element of CRWSP's operations that would threaten CRWSP's ability to provide water to hundreds of thousands of individuals.

The nature of that interest moreover easily distinguishes CRWSP from almost any other potential intervenor. Not only does South Carolina's complaint specifically target CRWSP and seek an injunction against its operations (*see* Part I, *supra*), but neither party state can adequately represent CRWSP's interests (*see* Part II, *supra*). Though a "State is presumed to speak in the best interest of [its] citizens" (*Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995)) that presumption is overcome here. Accepting the Special Master's recommendation thus would neither render this specific suit unmanageable nor set a precedent that invites widespread intervention by mere users of water.

There are, moreover, essential distinctions between the IBT implemented by CRWSP that South Carolina targets in its Complaint and other IBTs authorized under North Carolina law. First, for

purposes of intervention, it is highly relevant that the Complaint seeks an injunction against CRWSP, which establishes beyond any doubt CRWSP's interest in the outcome in the case. *See supra*. The prospect that other IBTs might be affected by the outcome of the case is far more hypothetical. Second, the withdrawal by CRWSP attacked in the Complaint is far more substantial than most. Only two IBT's authorized under North Carolina law are larger, and not surprisingly both are also the subject of the Complaint. *See* Compl. ¶¶ 20(a), 20(b). As a consequence, if South Carolina prevails in this case, North Carolina is very unlikely to be able to engage in sufficient conservation measures that the decree would not affect CRWSP's operations. Put another way, the allegations of the Complaint must at this stage of the proceedings be taken as true, and there is no reasonable prospect that if South Carolina prevails CRWSP's IBT would not be reduced. That manifestly is not true for many other holders of North Carolina IBT permits.

Nor does CRWSP's intervention threaten to draw this Court into an "intramural dispute." CRWSP does not assert any rights against other water users. The Special Master's order recommending that intervention be permitted limits CRWSP's participation and obviates any concern that the litigation would be sidetracked. Because CRWSP asserts no claim against either State, its intervention similarly raises no concern under the Eleventh Amendment. *Arizona v. California*, 460 U.S. 605, 614 (1983); S.C. Exceptions Br. 18 n.11.

The Special Master's order allowing intervention in *Nebraska v. Wyoming* is particularly instructive in

these circumstances. There, a private utility that served both of the party states found itself "caught in the crossfire of [the states'] litigation theories and strategies." *Nebraska* Intervention Order 3. Both Nebraska and Wyoming supported the utility's operations in part, but both also had a significant incentive to limit other aspects of its water uses to favor their own interests. At that point, the utility could not be expected to "be the 'roving child of various parens patriae.'" *Id.* 12. The Special Master accordingly permitted the utility to intervene for the limited purpose of protecting its interests.

CRWSP's position in this litigation as a bi-state supplier of water is indistinguishable, and the Special Master appropriately recommended allowing it to intervene for the limited purpose of protecting its unique interests. South Carolina asks this Court to presume that it will support CRWSP's operations to some extent (because the plant supplies water to its citizens) and that North Carolina will have a parallel interest to the extent of its own residents' consumption. But that argument paints only half of a picture of the States' litigating position with respect to CRWSP. Most important, just as in *Nebraska v. Wyoming*, it fails to account for the respects in which each State has an incentive to assail CRWSP's withdrawals as a part of the opponent-state's consumption.

This Court should also hesitate to overturn the Special Master's judgment – reached after very considerable study – that CRWSP's participation as a party will assist in the disposition of the case. *Cf.* *Arizona* v. *California*, 460 U.S. at 614-15; Report of the Special Master, *Alaska v. United States*, No. 128,

Orig. at 19 (Nov. 27, 2001) ("the rules applied in *New Jersey v. New York* are somewhat discretionary"). The Special Master received numerous submissions and held two hearings, as well as numerous case management conferences, that have informed her understanding that intervention would facilitate rather than impede the prompt and orderly disposition of the litigation. Unlike the Attorneys General of the party states, CRWSP has extensive direct familiarity with the hydrology of the Catawba River and the effects of water withdrawals and interbasin transfers. Its active participation in the context of its distinct interest in the case will assist the "full exposition of the issues" (*Maryland v. Louisiana*, 451 U.S. at 745 n.21), and thus the Special Master's resolution of the extremely complicated factual and legal issues presented by South Carolina's Complaint. Nothing in South Carolina's submission suggests that the Special Master is not best positioned to determine how the litigation should proceed.

In sum, it defies logic and sound principles of judicial administration to override the Special Master's determination that CRWSP should be permitted to participate in an action that will decide its fate – including with respect to the injunction against it sought by South Carolina – when none of the parties will otherwise serve as its champion. The Special Master's recommendation should be adopted and CRWSP's Motion to Intervene should be granted for the limited purpose of protecting its interests in the outcome of this case.

CONCLUSION

For the foregoing reasons, this Court should adopt the recommendation of the Special Master that CRWSP be permitted to intervene.

Respectfully submitted,

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No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Exceptions to the First Interim Report of the Special Master

REPLY BRIEF OF THE CITY OF CHARLOTTE IN RESPONSE TO EXCEPTIONS OF THE STATE OF SOUTH CAROLINA

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QUESTION PRESENTED

The City of Charlotte, North Carolina, possesses a Certificate, issued by the North Carolina Environmental Management Commission, authorizing Charlotte to carry out 33 million gallons per day in inter-basin transfers from the Catawba River. Charlotte's inter-basin transfers are the real targets of South Carolina's Complaint, which seeks to enjoin Charlotte's inter-basin transfer authority.

The question presented is whether the Special Master properly concluded that Charlotte should be allowed to intervene as a party defendant to defend her inter-basin transfer authority.

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REPLY BRIEF OF THE CITY OF CHARLOTTE IN RESPONSE TO EXCEPTIONS OF THE STATE OF SOUTH CAROLINA

INTRODUCTION

The Special Master correctly concluded that the City of Charlotte—the largest municipality and the largest provider of water supply and wastewater treatment services on the Catawba River—deserves the status of a party defendant in this original action. Charlotte possesses a certificate issued by the North Carolina Environmental Management Commission ("EMC") authorizing Charlotte to execute the inter-basin transfer ("IBT") of up to 33 million gallons per day ("MGD") from the Catawba River. Charlotte thus is the governmental entity in North Carolina vested with the authority to carry out the inter-basin transfers that are the true targets of South Carolina's Complaint. And Charlotte is the only entity that has carried actually out inter-basin transfers of water from the North Carolina portion of the river pursuant to a certificate issued by the EMC. The Special Master rightly ruled that, as "the authorized agent of the execution of the sovereign policy" allegedly injuring South Carolina, Charlotte is properly accorded party status. *New Jersey* v. *New York*, 345 U.S. 369, 375 (1953) (*per curiam*).

STATEMENT

A. Procedural History and Special Master's Findings and Conclusions

On January 15, 2008, this Court appointed Kristin Linsley Myles as Special Master and delegated to her the authority "to direct subsequent proceedings" in

the case. *South Carolina* v. *North Carolina*, 128 S. Ct. 1117 (2008). On February 13, 2008, the City of Charlotte filed her motion for leave to intervene. On March 17, 2008, this Court referred Charlotte's motion to Special Master Myles.

On March 28, 2008, the Special Master held a hearing on the intervention motions filed by the City of Charlotte, Duke Energy Carolinas, LLC ("Duke") and the Catawba River Water Supply Project ("CRWSP"). *See* Hearing Transcript ("Hrg. Tr."). On May 27, 2008, the Special Master granted the motions. *See* Order Granting Motions for Leave to Intervene ("SM Order"). On November 25, 2008, the Special Master issued a report recommending that this Court permit the interventions of Charlotte, Duke, and CRWSP. *See* First Interim Report of the Special Master ("SM Report").

As the Special Master found, "Charlotte is the largest municipality and provider of water supply and wastewater treatment services in the Catawba River basin." SM Report at 21. Furthermore, "Charlotte is the entity in North Carolina vested with authority to carry out the large majority of the inter-basin transfers of which South Carolina complains." *Id.*

In light of these findings, the Special Master correctly concluded that "Charlotte's interest in this case is compelling" and that "Charlotte has a direct stake in the present controversy." SM Order at 8. Indeed, "Charlotte has a unique interest in protecting her inter-basin transfer permit." *Id.* *See also id.* at 9 ("Charlotte has a special interest that sets it apart from the other citizens and creatures of the state whom North Carolina represents"). Charlotte

has "presented an interest sufficiently compelling and concrete" (SM Report at 25) to make her intervention proper.

B. Charlotte's Water Supply and Wastewater Treatment Services

Charlotte is the largest of 18 Metropolitan Statistical Areas in the two Carolinas, and is by far the largest provider of water supply and wastewater treatment services in the Catawba River basin. Since 1911, when Charlotte first tapped the Catawba River for water, the breadth of Charlotte's services has grown steadily until, in 2006, Charlotte served a population of more than 800,000 in six counties and nine towns in both North Carolina and South Carolina. Charlotte also has service connections with the City of Concord in Cabarrus County, and with Union County, enabling Charlotte to serve these areas on an emergency basis when needed. A cost-effective response to the water supply and sewage treatment services requirements of the metropolitan area's rapid expansion is likely to depend on Charlotte's system.

Charlotte's water supply service accounts for approximately 53 percent of all municipal usage of the water resources of the Catawba River basin. Among North Carolina users, Charlotte withdraws 64 percent of the water taken from the Catawba River for municipal water supplies.

Charlotte's population and her institutional, industrial, and commercial customer base are growing rapidly. From 1987 through 2006, the population in Charlotte's service area grew from about 480,000 to more than 800,000, and the demand for treated water supplies grew from 57 MGD to 110 MGD.

Recent studies project that these demands will continue to increase at an annual rate of 1.5 percent, resulting in water supply needs of 215 MGD and wastewater treatment needs of 159 MGD by 2050.

C. Charlotte's Inter-Basin Transfers and IBT Certificate

Charlotte is responsible for public water supplies to all of Mecklenburg County, which lies in the rolling terrain of the Appalachian foothills spanning the Rocky/Ya[illegible]n/Pee Dee ("RYPD") and Catawba River basins. The Catawba River forms the County's western boundary. A north-south ridgeline transects the County, leaving approximately the eastern one-third portion of the County in the RYPD basin, which offers far less plentiful and less dependable water supplies. For this reason, Charlotte relies on its Catawba River intakes and well-established system of water treatment facilities to service customers in both basins. After use, treated wastewater in the RYPD basin is discharged to local streams and rivers rather than being piped back to the Catawba River basin for discharge. This efficient process for serving all residents of the County results in inter-basin transfers.

Since 1990, Charlotte has experienced considerable population growth in the northern and eastern portions of its service area within Mecklenburg County. Much of the increased water demand resulting from population growth in these areas arises just east of the ridgeline within the RYPD basin. Especially in the northern portion of the service area, these expanding communities are located only a few miles from Charlotte's high-capacity water intake at Lake Norman on the Catawba River just west of the ridgeline. These customers cannot rely on the mea-

ger headwaters of the nearby Rocky River, and are located some 20 miles from the modest water flows of the upper reaches of the Yadkin River to the east.

On March 14, 2002, the EMC approved Charlotte's request for an increase in its IBT authority from 16.1 MGD to 33 MGD in order to meet water supply needs in eastern Mecklenburg County through the year 2030. *See* Environmental Management Commission, Certificate Authorizing the Charlotte-Mecklenburg Utilities to Increase Their Transfer of Water from the Catawba River basin to the Rocky River basin under the Provisions of G.S. 143-215.221 (Mar. 14, 2002) (attached as Exhibit 2 to Charlotte's Motion for Leave to Intervene) (1e-11e).

In granting Charlotte such increased IBT authority, the EMC found that

> the transfer is necessary to supply water to the growing communities of this area. Water from the source basin is readily available and within a short distance from the service area. Therefore the transfer is a reasonable allocation to these communities. The transfer will greatly benefit these communities by providing raw water of high quality for residential and industrial purposes.

Id. at 4e. The EMC also analyzed the effect of Charlotte's proposed 33 MGD IBT authority on the entire Catawba River basin, including water flows and utilization in South Carolina, and specifically found that, even with the resulting reductions in flows from Lake Wylie into South Carolina, detrimental effects on the basin would be "insignificant." *Id.* at 5e.

D. South Carolina's Targeting of Charlotte's Inter-Basin Transfers in this Case

As the United States and South Carolina have noted, this Court only "sparingly" exercises its discretion to permit a State to initiate suit under the Court's original jurisdiction. Br. for U.S. as *Amicus Curiae* at 9; *see* S.C. Exceptions at 17. "The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas* v. *New Mexico*, 462 U.S. 554, 571 n.18 (1983).

The Court has decided that this is such a case. *See South Carolina* v. *North Carolina*, 128 S. Ct. 349 (2007) (granting South Carolina's motion for leave to file bill of complaint). At the time the Court made that decision, it had before it South Carolina's Complaint ("Complaint"), the Brief of the State of South Carolina in Support of its Motion for Leave to File Complaint ("S.C. Br. in Support of Complaint"), and South Carolina's Reply Brief in support of her motion ("S.C. Reply Br."). Those documents set forth the specific allegations of injury to South Carolina, the specific actions in North Carolina allegedly causing that injury, and a prayer for relief seeking a decree from the Court enjoining those specific actions in order to redress the alleged injury. South Carolina satisfied the Court that the supposed harm in South Carolina, allegedly being caused by specific actions in North Carolina, was of such a serious magnitude that the Court should exercise its jurisdiction.

Several specific actions in North Carolina prompted South Carolina to bring this lawsuit and persuaded the Court to exercise its jurisdiction. Those actions

in North Carolina essentially boil down to Charlotte's inter-basin transfer of water from the Catawba River basin.

1. Actions in North Carolina Alleged to Cause Harm to South Carolina

South Carolina explains that she "has attempted to resolve *this dispute* through negotiations * * * but North Carolina has not been receptive to such efforts * * *." S.C. Br. in Support of Complaint at 1 (emphasis added). Left with no other option, she sought leave to file her Complaint. *See id.* at 1-2. According to South Carolina, her attempt at negotiation of "this dispute" is embodied in a December 19, 2006, two-page letter from the Attorney General of South Carolina to the Attorney General of North Carolina. *See* Complaint ¶¶ 26-29; App. to S.C. Br. in Support of Complaint at 7-8 (Ex. 2). The *only subject* addressed in that letter was a pending decision by North Carolina's EMC concerning an application for a Certificate authorizing the inter-basin transfer of water by the towns of Concord and Kannapolis, North Carolina. *See id.* The South Carolina Attorney General threatened to bring an action in this Court, but as an alternative offered to "negotiate an interstate compact addressing this issue." *Id.* at 8.

The EMC granted Concord-Kannapolis a 10 MGD IBT Certificate on January 10, 2007. *See* Complaint ¶ 20(b); S.C. Br. in Support of Complaint at 7. Despite the passage of more than two years, however, *no water* has been transferred by those towns or by anyone else pursuant to the Certificate. Consequently, the IBT decision characterized by South Carolina as "this dispute" cannot have caused any of

the alleged harm to present water uses in South Carolina.[1] No *casus belli* there.

South Carolina focuses on one IBT certificate issued to an entity that *has* carried out inter-basin water transfers in North Carolina. The EMC has authorized Charlotte Mecklenburg Utilities ("Charlotte") to transfer up to 33 MGD from the Catawba River basin. *See* Complaint ¶ 20(a); S.C. Br. in Support of Complaint at 7.

South Carolina mentions a third IBT approval held by CRWSP, which is a joint venture between Lancaster County Water and Sewer District in South Carolina and Union County in North Carolina. *See* S.C. Br. in Support of Complaint at 7 n.6. CRWSP withdraws water from the Catawba River *in South Carolina* and makes inter-basin transfers of that water under *approvals granted by the State of South Carolina. See id.*[2]

In all, South Carolina claims that North Carolina has issued Certificates authorizing the inter-basin transfer of 48 MGD of water from the Catawba River pursuant to North Carolina's IBT statute and that these inter-basin transfers exceed North Carolina's equitable share of the river. *See* Complaint ¶¶ 3-4.

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[1] South Carolina alleges that the IBT Certificates issued by the EMC to Charlotte and Concord-Kannapolis "have resulted in the transfer of tens of millions of gallons of water per day from the Catawba River." Complaint ¶ 20. *See also* S.C. Br. in Support of Complaint at 7. That allegation is incorrect as to Concord-Kannapolis; it is true only as to Charlotte.

[2] South Carolina's Complaint makes it appear that this transfer is made by Union County alone, and fails to mention that the water is withdrawn in South Carolina and transferred pursuant to South Carolina approvals. *See* Complaint ¶ 21.

Of the 48 MGD, Charlotte's IBT Certificate authorizes her to transfer 33 MGD, and since 2002 Charlotte has made actual use of her IBT authority. The Concord-Kannapolis Certificate authorizes the transfer of 10 MGD—but that authority has never been exercised. The remaining 5 MGD authorization belongs to Union County, North Carolina—but the water that Union County is authorized to transfer comes from South Carolina with South Carolina's approval. *See* S.C. Br. in Support of Complaint at 7 n.6. Thus, Charlotte's certificated inter-basin transfers are the only such transfers actually being carried out without South Carolina's approval.

South Carolina sums up the allegedly harmful actions in North Carolina with the assertion that Charlotte's transfers and the non-existent Concord/Kannapolis transfers "necessarily reduce the amount of water available to flow into South Carolina, exacerbate the existing natural conditions and droughts that contribute to low flow conditions in South Carolina, *and cause the harms detailed above*." S.C. Br. in Support of Complaint at 8 (emphasis added). Similarly, in her Reply Brief, South Carolina asserts that "North Carolina's inequitable interbasin transfers of water out of the Catawba River Basin *have caused*—and continue to threaten—substantial harm to South Carolina * * *." S.C. Reply Br. at 1. (emphasis added). Those *existing* transfers of water from the Catawba River *in North Carolina* are carried out by a single entity: Charlotte.

South Carolina states that she does not know how much water is transferred from the Catawba River basin by entities whose withdrawal amounts are too small (*i.e.*, less than 2 MGD) to require individual approvals under the North Carolina IBT statute. *See*

Complaint ¶ 22. Consequently, South Carolina's Complaint does not allege that these transfers are causing any harm in South Carolina. Moreover, while South Carolina characterizes these transfers as "implicitly permitted" by North Carolina, Complaint ¶ 22, the truth is they simply are not constrained by the North Carolina IBT statute, just as *intra-basin* water withdrawals are not constrained by statute in North Carolina.

Likewise, South Carolina says that she does not know how much water is withdrawn from the basin under a "grandfather" provision of the North Carolina IBT statute, which preserves the ability of water supply entities to utilize facilities that existed or were under construction on July 1, 1993, more than 15 years ago. *See* Complaint ¶ 23. This Court surely did not allow South Carolina to invoke its original jurisdiction based on the unknowns alleged in Paragraphs 22 and 23. *See Idaho* v. *Oregon*, 462 U.S. 1017, 1027 (1983) ("A State seeking equitable apportionment under our original jurisdiction must prove by clear and convincing evidence some real and substantial injury and damage.").

Finally, South Carolina devotes two paragraphs of her Complaint to a thirteen-year-old report by a North Carolina agency on water quality issues in the Catawba River Basin. *See* Complaint ¶¶ 12-13. She alleges that aspects of the report are relevant to the current dispute, *see id.* ¶ 13, but does not allege that any harm in South Carolina is being caused by pollution being discharged in North Carolina or that a decree from the Court should address water quality issues. This Court decided three decades ago that the federal common law no longer pertains to water pollution, that entire field having been preempted by

enactment of the 1972 Amendments to the Federal Water Pollution Control Act. *See City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981).

2. Actions in North Carolina Not Alleged to Injure South Carolina

South Carolina does not allege that any harm is caused by either of the two most significant factors (other than drought) influencing the flow of the Catawba River into South Carolina. These are: (1) Duke's complete control of river flows by its operation of six dams in North Carolina; and (2) consumptive uses of water within the Catawba River basin in North Carolina. These two factors dictate the flow of the river far more than any other action in North Carolina, and yet South Carolina studiously avoids alleging that her injury is attributable to either.

Because Duke impounds and releases all of the Catawba River in North Carolina, its operations control virtually all of the flows entering South Carolina, which would receive but a trickle of water during droughts but for Duke's ability to store water in wet periods and release it in dry periods. Duke performs this service under the terms of its federal license issued by the Federal Energy Regulatory Commission ("FERC"). As Duke has explained, the license requires water releases for numerous purposes, including downstream protection of fish and wildlife habitat and other water uses in South Carolina. *See* Duke Br. in Support of Mot. to Intervene at 2. Under its current license, Duke is required to release a minimum average daily flow into South Carolina of 411 cubic feet per second ("cfs"). *See* Duke Br. in Opp. to S.C. Exceptions at 5, 6. Pursuant to the new FERC license that Duke expects to

receive based on the Comprehensive Relicensing Agreement ("CRA"), that minimum flow would increase substantially to the range of 700 cfs to 1,300 cfs depending on the severity of drought conditions. *See id.* at 6. These increased flows are made possible, in part, by the increasingly stringent water conservation measures that North Carolina water users, such as Charlotte, already are required to implement according to their obligations as signatories to the CRA. *See id.* at 7.[3]

Although South Carolina mentions Duke's reservoir operations and their value to the region for hydropower generation, *see* S.C. Br. in Support of Complaint at 3-4, she does not allege that Duke's retention of river water or any inadequacy of reservoir releases have caused harm to South Carolina, and she seeks no injunctive relief that would alter Duke's release of water into South Carolina in the least. South Carolina seeks specific injunctive relief that would curtail Charlotte's inter-basin transfers from the North Carolina portion of the river, but nothing in South Carolina's Complaint seeks to prevent Duke from retaining that water for support of higher reservoir levels in North Carolina (*e.g.*, for energy capacity or to support recreation) rather than releasing it to increase river flows in South Carolina. South Carolina has not sued Duke or FERC, and she now opposes Duke's participation in the lawsuit. Indeed, she has acknowledged that the CRA and Duke's new FERC license will establish the mini-

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[3] In addition to being a signatory to the CRA, Charlotte occupies one of 12 seats on the Final Approval Committee. *See* CRA § 26.1; *see also* Charlotte's Mot. for Leave to Intervene at 8-10 (describing Charlotte's part in the CRA)

mum flow requirements to which Duke will have to adhere. *See* S.C. Exceptions at 50.

In addition, a variety of users in North Carolina withdraw and consume large amounts of water *within* the Catawba River basin, but South Carolina makes no mention of these uses and seeks no relief designed to affect them. From the lowest three reservoirs in North Carolina, for example—Norman, Mountain Island and Wylie—Duke withdraws and uses over 80 MGD and Charlotte withdraws and uses nearly 100 MGD. *See* CRA, App. H. No permit from North Carolina is required for these withdrawals. For its part, Charlotte is required to obtain FERC's permission for its withdrawals from these Duke-operated reservoirs.

3. South Carolina's Statement of the Question Presented for Review

South Carolina has framed the issue to be decided in this lawsuit as follows:

> Whether North Carolina's interbasin transfer statute is invalid under the Supremacy Clause of the United States Constitution and the constitutionally based doctrine of equitable apportionment because North Carolina, pursuant to that statute, has authorized and continues to authorize transfers of water from the Catawba River in excess of its equitable share of the waters of that interstate river, thereby harming South Carolina and its citizens. [S.C. Br. in Support of Complaint at i.]

Thus, South Carolina's own Question Presented focuses *exclusively* on the validity of North Carolina's IBT statute, inter-basin transfers from the Catawba River authorized pursuant to that statute, and the

harm to South Carolina allegedly caused by those transfers. South Carolina asserts that *those* transfers, in and of themselves, exceed North Carolina's equitable share of the Catawba River. *See* S.C. App. for Prelim. Inj. at 2 ("The transfers that North Carolina has authorized to date already exceed its equitable share of the Catawba River * * *."). South Carolina does not raise, as an issue in the case, either Duke's control of releases into South Carolina or the large intra-basin water uses made by Duke, Charlotte, and others. As explained above, the only such inter-basin transfer of water from North Carolina's portion of the river is Charlotte's.

4. South Carolina's Prayer for Relief

South Carolina aims its Prayer for Relief directly at the North Carolina IBT statute and the transfers authorized pursuant to that statute, *i.e.*, Charlotte's IBT Certificate. South Carolina seeks the following relief: (1) a decree declaring that "the North Carolina inter-basin statute cannot be used to determine each States' share of the Catawba River and equitably apportioning the Catawba River," and (2) a decree enjoining North Carolina "from authorizing transfers of water from the Catawba River" exceeding North Carolina's equitable share and also declaring that "the North Carolina inter-basin transfer statute is invalid to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment." Complaint at 10 (Prayer for Relief ¶¶ 1-2).

South Carolina's Prayer for Relief is noteworthy in that it does not claim entitlement to a specific quantum of Catawba River water or identify the amount of water by which North Carolina is allegedly exceeding its fair share. South Carolina seeks an equitable

apportionment, but she does so only in service of an effort to curtail the inter-basin transfers authorized by North Carolina's IBT statute and allegedly causing her harm—that is, Charlotte's inter-basin transfers. South Carolina seeks equitable apportionment, not as an end in itself, but as a means to restrict the North Carolina IBT statute and Charlotte's inter-basin transfers.

In sum, from its allegations of harm-causing actions in North Carolina, to its statement of the Question Presented, to its Prayer for Relief, South Carolina has focused *solely* upon *existing* inter-basin transfers in North Carolina, while never complaining of other water uses that determine the river's flow, and while seeking no injunctive relief against those uses. And the only certificated IBT authority in North Carolina actually in use—the only IBT authority of which South Carolina complains—is Charlotte's. South Carolina has styled her Complaint as one State against another, but the Complaint's allegations and requests for relief are aimed directly at the City of Charlotte.

SUMMARY OF ARGUMENT

1. The City of Charlotte's inter-basin transfers and certificated IBT authority are the true targets of South Carolina's Complaint. Charlotte should be allowed to become a party defendant in this case because she is "the authorized agent for the execution of the sovereign policy which [allegedly] threaten[s] injury to" South Carolina. *New Jersey* v. *New York*, 345 U.S. 369, 375 (1953) (*per curiam*). Charlotte's position in this case is virtually identical to that of New York City in *New Jersey* v. *New York*,

which this Court said was proper party defendant in that case.

2. Charlotte should not be denied party status merely because her home state of North Carolina is already a party. South Carolina's reliance upon the denial of the City of Philadelphia's motion to intervene in the *New York* case is misplaced. Among other reasons, Pennsylvania opposed Philadelphia's motion to intervene on sovereignty grounds while North Carolina supports Charlotte's motion to intervene.

If Charlotte must make some showing of inadequacy of representation, Charlotte can do so. North Carolina may not adequately represent Charlotte in this action because their interests are not coextensive. North Carolina must represent the interests of all North Carolina citizens, while Charlotte has a narrower interest in representing her residents and those in her service area. Furthermore, North Carolina must balance the interests of both upstream and downstream users of the Catawba River, while Charlotte's interest is exclusively that of a downstream user.

3. Allowing Charlotte to intervene will not lead to unlimited intervention, create problems with respect to case management, or impede a possible settlement of the case.

ARGUMENT

The Special Master correctly concluded that the City of Charlotte should be allowed to intervene as a party defendant in this case. The Court should give deference to the Special Master's findings and conclusion with respect to Charlotte's proposed inter-

vention. Rulings on intervention motions are generally reviewed for abuse of discretion. *See Georgia* v. *Ashcroft*, 539 U.S. 461, 477 (2003) ("[T]he District Court did not abuse its discretion in granting the motion to intervene in this case."); *NAACP* v. *New York*, 413 U.S. 345, 366 (1973) (timeliness of intervention motion "is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review"); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142 (1944) ("The exercise of discretion in a matter of this sort [permissive intervention] is not reviewable by an appellate court unless *clear abuse* is shown; * * *.") (emphasis added). As shown below, the Special Master's ruling on Charlotte's motion to intervene was a proper exercise of her delegated authority "to direct subsequent proceedings" in the case. *South Carolina* v. *North Carolina*, 128 S. Ct. 1117 (2008).

I. CHARLOTTE IS A PROPER PARTY DEFENDANT IN THIS ACTION BECAUSE CHARLOTTE'S INTER-BASIN TRANSFER AUTHORITY IS THE REAL TARGET OF SOUTH CAROLINA'S COMPLAINT.

The City of Charlotte should have a right to become a party to this original action, first and foremost, because Charlotte is the entity in North Carolina vested with the authority to carry out the inter-basin transfers of Catawba River water that is the true target of South Carolina's Complaint. *See* SM Report at 21.

Charlotte possesses a Certificate, issued in 2002 by the EMC, authorizing Charlotte to execute inter-basin transfers from the Catawba River of 33 MGD. *See* Ex. 2 to Charlotte Mot. for Leave to Intervene.

Charlotte's IBT Certificate was issued pursuant to North Carolina's IBT statute. *See* N.C. Gen. Stat. § 143-215.22L.

South Carolina's Complaint focuses upon the 48 MGD of water authorized by North Carolina law and the EMC to be transferred from the Catawba River basin. *See, e.g.*, Complaint ¶¶ 3, 20. Indeed, South Carolina specifically complains about Charlotte's IBT Certificate authorizing "the Charlotte-Mecklenburg Utilities to transfer up to 33 million gallons per day from the Catawba River Basin to Rocky River Basin, more than double the 16 million gallons per day limit that had previously applied." *Id.* ¶ 20(a). As the Special Master found, inter-basin transfers are "the central focus of the Complaint." SM Report at 9. Indeed, inter-basin transfers "are the primary if not the exclusive means by which South Carolina claims to have been harmed." *Id.* at 38. Charlotte's IBT authority represents the lion's share of such authority licensed by the EMC, and to date Charlotte is the only entity to have actually transferred water from the North Carolina portion of the river pursuant to an EMC Certificate.

Moreover, the relief that South Carolina seeks directly targets Charlotte's IBT authorization. South Carolina seeks a decree "enjoining North Carolina from authorizing transfers of water from the Catawba River, past or future, inconsistent with" North Carolina's share of the Catawba River. Complaint at 10 (Prayer for Relief ¶ 2). And South Carolina has already made clear its contention that Charlotte's IBT authorization exceeds North Carolina's share of the river. *See* S.C. App. for Prelim. Inj. at 2 ("The transfers that North Carolina has authorized to date

already exceed its equitable share of the Catawba River * * *.").

That Charlotte should be a party to this action is strongly supported by New York City's party status in *New Jersey* v. *New York*. In that case, New Jersey sued the State and City of New York in 1929 to enjoin a proposed diversion of water from the Delaware River "in order to increase the water supply of the City of New York." *New Jersey* v. *New York*, 283 U.S. 336, 342 (1931).[4] New York City was present in the case as a party, this Court explained, "since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey." *New Jersey* v. *New York*, 345 U.S. 369, 375 (1953) (*per curiam*). "New Jersey joined the City of New York as a defendant, because the City, acting under State authority, was planning the actual diversion of the water for its use." *Id.* at 370-371.

Charlotte's position in this case is virtually identical to that of New York City in the *New York* case. Charlotte is the "authorized agent for the execution of the sovereign policy" which allegedly injures South Carolina—*i.e.*, the inter-basin transfers of Catawba River water—and it is Charlotte that, "acting under State authority," is responsible for the "actual diversion" of water that South Carolina claims is injurious. *Id.* at 370, 375. *See also* SM Report at 13-14, 22, 39 (analyzing and applying *New York*).

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[4] The Commonwealth of Pennsylvania promptly moved to intervene, and this Court granted the motion in January 1930. *See New Jersey* v. *New York*, 280 U.S. 528 (1930) (order).

To be sure, New York City, unlike Charlotte, "was forcibly joined as a defendant to the original action." *New York*, 345 U.S. at 375. But the fact that South Carolina omitted Charlotte from the case caption as a named defendant—while targeting Charlotte in her allegations, claims, and prayer for relief—in no way undermines the propriety of allowing Charlotte voluntarily to join the litigation as a party defendant. "Even though Charlotte has not been named by South Carolina as a defendant, for practical purposes non-incidental relief is sought against it, and it 'should have suitable opportunity to show the nature of [its] interest and why the relief against [it] individually should not be granted.'" SM Report at 22-23 (quoting *Kentucky* v. *Indiana*, 281 U.S. 163, 173-174 (1930) (Special Master's brackets)). As the Special Master reasoned, the injunction that South Carolina seeks—*i.e.*, one that would invalidate North Carolina's IBT statute and the IBT certificates issued thereunder, including Charlotte's—"would affect Charlotte directly, such that it should be permitted to defend itself" in this action as a party. SM Report at 22 (citing *Utah* v. *United States*, 394 U.S. 89, 92 (1969) (*per curiam*)). Given that South Carolina's Complaint takes direct aim at Charlotte's IBT authority, "it would seem fairest to permit [Charlotte] to speak for itself" in defense of that authority. *Utah*, 394 U.S. at 92.

South Carolina may be the master of her complaint, *see* S.C. Exceptions at 31, but that maxim is subject to the doctrines of joinder and intervention. *See Lincoln Prop. Co.* v. *Roche*, 546 U.S. 81, 91 (2005). A plaintiff's right to pick her opponents does not trump the right of other interested persons to join the fray—especially in the context of an original

action. *See* SM Report at 16-17. Moreover, as the master of her complaint, South Carolina specifically complained of Charlotte's inter-basin transfers pursuant to her IBT Certificate—the only such certificated transfers currently taking place—and South Carolina seeks an injunction against Charlotte's transfers. Having aimed her Complaint at Charlotte, South Carolina should not be surprised that Charlotte seeks to join the case to defend her interests.

Missouri v. *Illinois*, 180 U.S. 208 (1901), provides further support for affording Charlotte party status. *See* SM Report at 14. In that original action, Missouri filed a bill of complaint against Illinois and the Sanitary District of the City of Chicago seeking to enjoin those two defendants from discharging sewage into the Mississippi River. Ruling on a demurrer to the bill, this Court deemed both Illinois and the Chicago Sanitary District to be proper party defendants. With respect to the Chicago Sanitary District, this Court commented that it "is an agency of the state to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended." 180 U.S. at 242. Exactly the same can be said here of the City of Charlotte.

South Carolina argues that Charlotte's interest in defending her IBT Certificate is not "compelling." S.C. Exceptions at 44. South Carolina's argument is based on the erroneous premise that Charlotte's IBT authority under North Carolina law is irrelevant in equitable apportionment analysis. The Special Master rightly rejected this argument. *See* SM Report at 36 (South Carolina's "argument does not accurately state the role of state law in equitable

apportionment analysis."); *id.* at 37 ("The Court consistently has held that state law, and water uses authorized by state law, are to be considered and weighed as the circumstances require."). Charlotte's interest in preserving her rights under the IBT Certificate issued by the EMC should be given significant weight in any equitable apportionment of the Catawba River. *See, e.g., Idaho* v. *Oregon*, 462 U.S. 1017, 1025 (1983) (although not necessarily dispositive, "existing legal entitlements are important factors in formulating an equitable decree"); *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945) (in equitable apportionment analysis, "the extent of established uses" is one of several "relevant factors"); *Connecticut* v. *Massachusetts*, 282 U.S. 660, 670-671 (1931) (equitable apportionment is based "upon a consideration of the pertinent laws of the contending States and all other relevant factors").

Charlotte's interest in defending her IBT certificate issued by the EMC qualifies as a "significantly protectable interest" for purposes of intervention analysis, *Donaldson v. United States*, 400 U.S. 517, 531 (1971), and gives Charlotte a "direct stake in this controversy." *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981). Without question, Charlotte "has a vital interest in this case." *Lincoln Prop. Co.*, 546 U.S. at 92-93. Indeed, since Charlotte's inter-basin transfers are the true target of South Carolina's Complaint, Charlotte is properly characterized as a real party in interest in this case. *See Sierra Club* v. *Glickman*, 82 F.3d 106, 109 (5th Cir. 1996) (intervenors were "real parties in interest" in environmental litigation where plaintiff's complaint "target[ed]" intervenor's conduct and the injunctive relief sought by plaintiff was "intend[ed] to have a direct impact

upon" intervenors); *see also Conservation Law Found. of New England, Inc.* v. *Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992) (intervenors were "the real targets of the suit").

Because South Carolina seeks to nullify Charlotte's IBT certificate, Charlotte is, in the terminology of Federal Rule of Civil Procedure 19, a "required party" to this litigation. Under Rule 19, a person is a "required party" if it "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i); *see Republic of Philippines* v. *Pimentel*, 128 S. Ct. 2180, 2184-85 (2008) (discussing the 2007 revision to Rule 19). Here, Charlotte's interest in her IBT certificate clearly relates to the subject matter of this original action, and the relief South Carolina seeks, if granted, would certainly impair or impede Charlotte's ability to protect that interest. Charlotte should therefore be allowed to intervene. *See* Advisory Committee Notes to 1966 Amendment to Fed. R. Civ. P. 24 ("Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) [now 19(a)(1)(B)(1)] on joinder of persons needed for a just adjudication").

II. CHARLOTTE SHOULD NOT BE DENIED THE RIGHT TO INTERVENE SIMPLY BECAUSE NORTH CAROLINA IS A PARTY.

Charlotte should not be denied the status of a party defendant—and the opportunity to defend her IBT authority—on the ground that her home state of North Carolina is already a defendant.

A. Charlotte's Situation Differs in Material Respects From That of the City of Philadelphia in *New Jersey* v. *New York*.

South Carolina relies on the *New York* case and this Court's decision to deny the City of Philadelphia's request to intervene in that action. But the Court had compelling reasons to deny Philadelphia's motion to intervene that do not apply to Charlotte. Charlotte's situation differs in several material respects from that of the City of Philadelphia.

First, Philadelphia was not "the authorized agent for the execution of the sovereign policy which threatened injury" to the plaintiff State. *New York*, 345 U.S. at 375. Charlotte is. In *New York*, Philadelphia argued that she should be allowed to intervene because New York City was already present in the case as a party. *See id.* at 374. Rejecting the argument, this Court explained that New York City was a proper party because, unlike Philadelphia, "she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey." *Id.* at 375. Here, Charlotte's position in the case is analogous to that of New York City, not Philadelphia. As the authorized agent of the alleged injury about which South Carolina complains, it is proper for Charlotte to join this case as a party defendant. *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 637 (9th ed. 2007) (observing that, although Philadelphia was denied intervention in *New York*, in the same case the joinder of New York City "whose action was threatening the plaintiff state was said to be proper").

Second, the Commonwealth of Pennsylvania—Philadelphia's home state—*opposed* Philadelphia's proposed intervention. So did every other party—

New Jersey, New York State, and New York City. *See New York*, 345 U.S. at 372 ("All of the present parties to the litigation have formally opposed the motion to intervene * * *."). Pennsylvania strongly opposed Philadelphia's intervention on sovereignty grounds, arguing that "such intervention would not only be in derogation of the sovereignty and prerogatives of the Commonwealth, but would also be subversive of the right and duty of its Attorney General to represent the Commonwealth in all actions and to conduct any litigation on its behalf and on behalf of its citizens." Answer on Behalf of Commonwealth of Pennsylvania, Intervenor, to Intervening Petition of City of Philadelphia ¶ 15, *New Jersey* v. *New York*, No. 5, Orig. (U.S. filed Dec. 31, 1952). The forceful opposition of Philadelphia's home state (not to mention every other party) was surely a significant factor in the Court's decision to deny intervention.

Here, in contrast, North Carolina does not oppose Charlotte's intervention—a fact that the Special Master considered. *See* SM Order at 9 ("Notably, North Carolina has not objected to Charlotte's proposed intervention."). Indeed, North Carolina *supports* giving Charlotte party status. *See* N.C. Br. in Opp. to S.C. Exceptions at 23 ("North Carolina agrees with the Special Master's recommendation that Charlotte be allowed to intervene."). North Carolina states that "Charlotte has a substantial and compelling interest in requesting leave to intervene" and that, just as New York City was permitted to appear as a defendant in the *New York* case, "Charlotte should be permitted to participate as a defendant here." *Id.* at 21-22, 22. Thus, South Carolina is simply wrong to say that "North Carolina and Charlotte stand in precisely the same relationship as

Pennsylvania and Philadelphia in *New Jersey* v. *New York*." S.C. Exceptions at 40. Pennsylvania strongly opposed Philadelphia's intervention; North Carolina supports Charlotte's.[5]

That Philadelphia's home state opposed her proposed intervention, while Charlotte's home state does not oppose hers, is a significant difference between the two cases. The principle that a State ordinarily is deemed to represent all its citizens is in large measure "a necessary recognition of sovereign dignity." *New York*, 345 U.S. at 373. "Otherwise, a state might be judicially impeached on matters of policy by its own subjects * * *." *Id.* Here, however, North Carolina supports Charlotte's motion to intervene and perceives no affront to her sovereignty from Charlotte's joining this case as a co-defendant. Indeed, North Carolina "is not concerned that it will be judicially impeached by Charlotte's positions in this action." N.C. Br. in Opp. to S.C. Exceptions at 23. Thus, North Carolina's prerogatives as a sovereign State are not a reason to exclude Charlotte from the case.

In any event, the "sovereign dignity" at issue here belongs to North Carolina, not South Carolina.

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[5] That Charlotte's home state does not oppose her intervention also distinguishes Charlotte's situation from that of Basin Electric Power Cooperative, which sought to intervene in *Nebraska* v. *Wyoming* against the wish of its home state of Wyoming. "Wyoming opposed intervention by Basin Electric on the basis of her *parens patriae* role in equitable apportionment proceedings." Special Master's First Interim Report at 11, *Nebraska* v. *Wyoming*, No. 108, Orig. (U.S. filed June 26, 1989). Furthermore, as Duke explains, the Special Master granted a renewed motion to intervene filed by Basin Electric. *See* Duke Br. in Opp. to S.C. Exceptions at 22-23.

South Carolina lacks standing to raise North Carolina's sovereign prerogatives in opposition to Charlotte's intervention where North Carolina has not done so. *See* Hrg. Tr. 63; *see also Ponzi* v. *Fessenden*, 258 U.S. 254, 260 (1922) (a sovereign's decision whether or not to assert a right of sovereignty "is a matter that addresses itself solely to the discretion of the sovereignty making it").

Third, Philadelphia sought to intervene in the *New York* case more than twenty years too late. New Jersey filed suit against the New York defendants in 1929, Pennsylvania intervened in 1930, and this Court entered its original decree in 1931. Philadelphia did not move to intervene until 1952—more than two decades after each of these events. *See New York*, 345 U.S. at 370-374.[6] Here, Charlotte timely filed her motion to intervene just weeks after this Court appointed the Special Master. South Carolina does not contend, and has never contended, that Charlotte's motion to intervene was untimely.

B. Charlotte Should Not be Denied Party Status Based on the Claim That North Carolina Will Adequately Represent Charlotte's Interests.

South Carolina argues that Charlotte should be denied intervention because Charlotte is adequately represented by North Carolina. In so doing, South Carolina leans heavily upon the *New York* Court's statement that "[a]n intervenor whose state is already a party should have the burden of showing

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[6] Philadelphia filed its motion to intervene on December 13, 1952, eight months after New York City, supported by New York State, had moved on April 1, 1952 to modify in certain respects the 1931 decree.

some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." 345 U.S. at 373.

New York did not announce a categorical imperative forbidding a city's presence as a party in a case where the city's home state is already party. *See* SM Report at 23 ("[T]here is no indication the Court intended this to mean that there must be a conflict of interest or some other disabling factor that would prevent the party state from representing the proposed intervenor's interests."). In *New York* itself, the Court did not require any party to show cause why New York City was not adequately represented by New York State. This Court did not do so when New Jersey filed suit in 1929 against both the State and City of New York or when New York City moved in 1952 to modify the decree previously entered in that case.

Nor has the Court always required an intervening city to make the showing suggested in *New York*. In *Texas* v. *Louisiana*, this Court permitted the City of Port Arthur, Texas, to intervene even though Texas was already a party. *See Texas* v. *Louisiana*, 416 U.S. 965 (1974) (order granting Port Arthur's motion to intervene); *see also Texas* v. *Louisiana*, 426 U.S. 465, 466 (1976) (noting that Port Arthur "was permitted to intervene for purposes of protecting its interests in the island claims of the United States"). Port Arthur did not attempt to make the showing suggested in *New York*, and this Court granted Port

Arthur's motion to intervene without demanding such a showing.[7]

This Court has explained that a "state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens." *Kentucky* v. *Indiana*, 281 U.S. 163, 173 (1930). Thus, "[c]itizens, voters, and taxpayers, *merely as such*, of either state, *without a showing of any further and proper interest*, have no separate individual right to contest in such a suit the position taken by the state itself." *Id.* (emphases added). Were the rule otherwise, "all the citizens of both states * * * would be entitled to be heard." *Id.*

But when a State in an original action seeks relief against a citizen of another State, that citizen has a right to be in the case as a party. "An individual citizen may be a party where relief is properly sought as against him, and in such case he should have suitable opportunity to show the nature of his interest and why the relief asked against him individually should not be granted." *Id.* at 173-174. Here, Charlotte's inter-basin transfers are the real target of the relief that South Carolina seeks. Accordingly, Charlotte should have the opportunity to appear on her

[7] The propriety of allowing cities to appear on their own behalf and conduct their own defense in original actions is confirmed by *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). In that case, the State of Illinois sued four Wisconsin cities but not did not name as a defendant the State of Wisconsin. This Court concluded that Illinois was not required to bring Wisconsin into the case, explaining that "while, under appropriate pleadings, Wisconsin could be joined as a defendant in the present controversy, it is not mandatory that it be made one." *Id.* at 97.

own behalf, defend her IBT authority (including by developing a record justifying that authority), and argue against South Carolina's allegations of injury and claims for relief.

Furthermore, this Court has described the statement from *New York* on which South Carolina relies as a "general rule" and has compared it to Federal Rule of Civil Procedure 24(a)(2). *Nebraska* v. *Wyoming*, 515 U.S. 1, 21 (1995). And this Court has explained that the adequacy of representation requirement in Rule 24 "should be treated as minimal." *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). The requirement is satisfied so long as the intervenor "shows that representation of his interest 'may be' inadequate." *Id.* There need only be "sufficient doubt about the adequacy of representation to warrant intervention." *Id.* at 538.[8]

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[8] What this Court said in *Trbovich*—that the adequacy of representation requirement is a "minimal burden" that is satisfied if the representation "may be" inadequate—is now well-established law in the courts of appeals. *See, e.g., Utah Ass'n of Counties* v. *Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001); *Sierra Club* v. *Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994); *Sierra Club* v. *Robertson*, 960 F.2d 83, 85-86 (8th Cir. 1992) ("The proposed intervenors need show only that there is a *potential* for inadequate representation." *Grutter* v. *Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999) (emphasis in original). "One is not required to show that the representation will in fact be inadequate." *Michigan State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997). Furthermore, where, as here, an intervenor shows "that a very strong interest exists," a "lesser showing of impairment or inadequacy of representation" is sufficient. *United States* v. *Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984) (Friendly, J.). *Accord Daggett* v. *Commission on Gov't. Ethics & Election Practices*, 172 F.3d 104, 113-114 & n.3 (1st Cir. 1999).

Here, the State of North Carolina may not adequately represent the City of Charlotte's interests because their interests are not co-extensive. North Carolina is "obliged to represent the interests of all [North Carolina] citizens" while Charlotte "has a narrower but independently vital interest in representing its residents." *Sierra Club* v. *Glickman*, 82 F.3d 106, 110 (5th Cir. 1996). In *Sierra Club* v. *Glickman*, the Fifth Circuit held that the U.S. Department of Agriculture did not adequately represent the State of Texas in a suit alleging the overpumping of a Texas aquifer. Similarly, North Carolina may not adequately represent Charlotte in this suit alleging overconsumption of the Catawba River because North Carolina must represent the interests of the entire State, not just Charlotte's narrower interests. Just as Texas was entitled to intervene in *Sierra Club* v. *Glickman*, Charlotte should be allowed to intervene here. *See also Sierra Club* v. *City of San Antonio*, 115 F.3d 311, 315 (5th Cir. 1997) (in separate suit over same aquifer, finding it "axiomatic" that the interests of several Texas cities "that rely on the aquifer's water supply for their immediate subsistence, will diverge from those of * * * the state *qua* state and as *parens patriae*"); *Forest Conserv. Council* v. *U.S. Forest Service*, 66 F.3d 1489, 1499 (9th Cir. 1995) ("The Forest Service is required to represent a broader view than the more narrow, parochial interests of the State of Arizona and Apache County.") (holding that the State and County were entitled to intervene in environmental litigation brought against the Forest Service).

That Charlotte has a narrower interest than North Carolina is reflected in the Answer that each filed. North Carolina asks the Court to "[d]eny any af-

firmative relief requested by Plaintiff" and to "[d]ismiss the Complaint with prejudice." N.C. Answer to Bill of Complaint at 26. Charlotte requests that general relief but also seeks relief specific to Charlotte. Charlotte has asked the Court to "[p]rotect Charlotte's interest in its interbasin transfers authorized pursuant to North Carolina law," "[p]rotect Charlotte's interests in sufficient Catawba River withdrawals to fully satisfy Charlotte's present and future water supply needs," and "[p]rotect Charlotte's interests arising out of and related to Duke's current FERC License, the Comprehensive Relicensing Agreement, and any new FERC license to be issued." Answer of the City of Charlotte at 13. In addition, Charlotte has raised Charlotte-focused defenses that North Carolina has not specifically raised. For example, for her Fifth Defense Charlotte contends that South Carolina's claims are barred, at least in part, by the doctrines of laches and estoppel because South Carolina participated in the proceedings before the EMC relating to Charlotte IBT application and did not oppose Charlotte's application in those proceedings. *See id.* at 11.

Since Charlotte's interests and North Carolina's differ, Charlotte should not be denied intervention. "[T]he fact that North Carolina's interests may be similar to Charlotte's does not preclude it from appearing and defending its [inter-basin] transfer permit." SM Report at 24. In the American legal system, it is fundamental that a party generally may not be denied the opportunity to appear in court on his own behalf on the theory that his interests are adequately represented by someone else. *Cf. Taylor* v. *Sturgell*, 128 S. Ct. 2161 (2008) (disapproving the preclusion doctrine of "virtual representation").

The interests of North Carolina and Charlotte necessarily differ because North Carolina must represent the interests of all water users in the State along the Catawba River, including municipal users upstream of Charlotte whose interests may not be aligned with Charlotte's interests. Charlotte's interest, meanwhile, is exclusively that of a downstream water user.

The Eighth Circuit in *South Dakota* v. *Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003) (*South Dakota*), *cert. denied*, 541 U.S. 987 (2004), addressed a similar situation. There, the State of South Dakota sued the U.S. Army Corps of Engineers over the Corps' decisions with respect to the release of water from reservoirs on the Missouri River. The State of Nebraska moved to intervene, but the District Court denied the motion. Relying on the *parens patriae* principle, the District Court ruled that Nebraska's interests were adequately represented by the Corps.

The Eighth Circuit reversed and held that Nebraska was entitled to intervene as a matter of right. Addressing *parens patriae*, the Eighth Circuit observed that "[t]he Corps is charged with managing the Missouri River system as a whole—a charge that requires it to balance the interests of upstream and downstream users. The proposed intervenors, on the other hand, wish to represent exclusively downstream interests." 330 F.3d at 1025. In light of the Corps' charge to represent both upstream and downstream users, the Eighth Circuit reasoned that the *parens patriae* principle was not a bar to Nebraska's intervention. As the Eighth Circuit stated:

> South Dakota asks this Court to hold that the Corps will adequately represent downstream us-

> ers. We decline to do so. Given that the Corps is asked to balance multiple interests, we conclude that it cannot adequately represent the interests of downstream users in this case. The *parens patriae* presumption, therefore, does not present an obstacle to intervention. [*Id.*]

South Dakota illustrates a salient difference between Charlotte's interest and North Carolina's. Charlotte sits on the border between North Carolina and South Carolina, and Charlotte's service area extends downstream of all other North Carolina users of the Catawba River. North Carolina—like the Corps in *South Dakota*—must "balance [the] multiple interests" of all "upstream and downstream users" of the river in the State whereas Charlotte's interests are "exclusively downstream." *Id.*

C. Charlotte Easily Meets the Criteria for Permissive Intervention.

Arizona v. *California*, 460 U.S. 605 (1983), supports Charlotte's intervention notwithstanding South Carolina's adequate representation argument. There, this Court allowed certain Indian Tribes to intervene in an equitable apportionment action. The United States did not oppose the Tribes' intervention, but the plaintiff State and all four defendant States opposed intervention "on grounds that the presence of the United States insures adequate representation of the Tribes' interests." *Id.* at 611. This Court rejected the argument, reasoning that "it is obvious that the Indian Tribes, at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules." *Id.* at 614-615. Charlotte, too, clearly meets the test for permissive intervention. *See* Fed. R. Civ. P. 24(b)(1)(B) ("On timely

motion, the court may permit anyone to intervene who * * * has a claim or defense that shares with the main action a common question of law or fact."). Here, Charlotte's defense of her IBTs and IBT authority go to the heart of the factual and legal questions in this case.

The instant case also conforms to *Arizona* v. *California* because the party said to represent Charlotte's interests—North Carolina—does not oppose Charlotte's intervention while the party opposing intervention—South Carolina—"ha[s] failed to present any persuasive reason why [its] interests would be prejudiced or this litigation unduly delayed by [Charlotte's] presence." 460 U.S. at 615. *See* SM Report at 42.

III. GRANTING CHARLOTTE'S MOTION TO INTERVENE WILL NOT LEAD TO UNLIMITED INTERVENTION, CREATE CASE MANAGEMENT PROBLEMS, OR IMPEDE SETTLEMENT.

Drawing again on language in the *New York* case, South Carolina argues (Exceptions at 41-44) that Charlotte cannot demonstrate an interest "apart from [her] interest in a class with all other citizens and creatures of the state." *New York*, 345 U.S. at 373. If Charlotte were allowed to intervene, South Carolina contends, "there would be no practical limitation on the number" of other North Carolina entities that would be entitled to intervene. *Id.*

The Special Master considered and rejected South Carolina's argument. *See* SM Order at 9 ("Charlotte has a special interest that sets it apart from the other citizens and creatures of the state whom North Carolina represents as *parens pa-*

triae."); SM Report at 25 ("Because Charlotte's right to intervene turns on its status as one of the recipients of the three interbasin transfers that South Carolina identifies in its Complaint, there is a practical limitation on the number of similarly situated entities that would be entitled to be made parties.").

Not only is Charlotte the largest municipality and provider of water supply services in the Catawba River basin, but Charlotte holds the IBT certificate authorizing the largest and most significant interbasin transfers of Catawba River water. And Charlotte is the *only* entity actually transferring water out of the basin from North Carolina's portion of the river pursuant to an IBT Certificate. Accordingly, Charlotte is hardly "in a class with all other citizens and creatures of the state." *New York*, 345 U.S. at 373. There are other municipalities along the Catawba River, but Charlotte's size, her certificated IBT authority, and her actual exercise of that authority, place her in a class by herself. *See* SM Order at 8 ("Charlotte has a unique interest in protecting its inter-basin transfer permit.").

In February 2008, when South Carolina first opposed Charlotte's motion to intervene, South Carolina predicted that if Charlotte's motion were granted, "then it would seem inevitable that many more such motions will follow." S.C. Opp. to Charlotte's Mot. for Leave to Intervene at 6. South Carolina's prediction was not just wrong—it was as wrong as it could be. Not a single intervention motion followed Charlotte's. The Special Master granted Charlotte's motion in May 2008, yet no other entity has attempted to intervene since she so ruled. In all, a grand total of three entities have sought leave to intervene in this action. This Court has said that

"[o]ur original jurisdiction should not be * * * expanded to the dimensions of ordinary class actions." *New York*, 345 U.S. at 373. Allowing Charlotte to join this case will not cause the proceedings to take on the size of a typical class action. Furthermore, any other entity seeking to join the litigation at this point would have to explain why its intervention was not untimely.

Nor will intervention cause case management problems. The intervenors have actively participated in this case for almost a year, including in multiple conferences with the Special Master. She has concluded that their inclusion will aid, not thwart, the adjudication of this matter and that any "particular issues or objections relating to participation by Intervenors may be addressed as part of the case management process." SM Report at 34.

Finally, contrary to the concern expressed by the Solicitor General (Br. for U.S. as *Amicus Curiae* at 21), allowing the intervenors to join the case will not make settlement less likely. In fact, just the opposite is true. A viable and lasting settlement that can win all of the necessary approvals is more likely to come about if all of the parties with the greatest interest in this matter are allowed to join this case and help shape the terms of any agreed-upon resolution.

CONCLUSION

For the foregoing reasons, South Carolina's exceptions to the Special Master's First Interim Report should be overruled, and Charlotte's motion to intervene should be granted.

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MARCH 2009

No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Exceptions to
First Interim Report of the Special Master

DUKE ENERGY CAROLINAS, LLC'S BRIEF IN REPLY TO SOUTH CAROLINA'S EXCEPTIONS TO FIRST INTERIM REPORT

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INTRODUCTION

On October 1, 2007, this Court granted South Carolina's motion for leave to file a bill of complaint against North Carolina. The action seeks an equitable apportionment of the Catawba River. In November 2007, pursuant to Supreme Court Rule 17, Duke Energy Carolinas, LLC ("Duke") sought leave to intervene. This motion was referred to Special Master Kristin Myles, who granted Duke's motion. As the Special Master correctly recognized in her First Interim Report, Duke has compelling interests in the Catawba River waters in both North and South Carolina that give it a direct stake in the River's equitable apportionment and those interests are not represented by either State.

For decades, acting prior to and pursuant to a 50-year license issued in 1958 by the predecessor to the Federal Energy Regulatory Commission ("FERC"), Duke and its predecessors have impounded water from the Catawba in eleven reservoirs located in both States (six in North Carolina, four in South Carolina and one that crosses the border between them) to provide hydroelectric power and other benefits to the region. It is the Duke impoundments along the Catawba River that provide the water that flows into South Carolina during periods of drought and low flow. It is Duke's FERC license that governs the minimum flow of the River into South Carolina in those same times of drought and low flow. It is Duke that brought together over 70 stakeholders in the Catawba River, including governmental units in North and South Carolina, to negotiate the Comprehensive Relicensing Agreement ("CRA") that addresses virtually every conceivable Catawba River water use and management issue as part of Duke's

effort to obtain FERC relicensing. And, it is Duke which would have to implement any equitable apportionment ultimately ordered.

Duke has vital interests in its impounded waters, its operations, its FERC license, and the CRA which forms the basis of its application for FERC relicensing. Indeed, it is Duke's position that the CRA reflects an equitable apportionment of the Catawba River; that if the FERC license is renewed based on the CRA, any equitable apportionment must respect and incorporate the terms of the CRA; and that threats to the CRA imperil Duke's paramount interest in renewal of its FERC license.

As the Special Master found, Duke can protect its compelling interests only by participating in equitable apportionment proceedings as a party. Neither North nor South Carolina can adequately represent Duke's interests in its impounded waters in both States, its operations under its FERC license, and in preserving the negotiated compromise of the CRA. Although the United States asserts that North and South Carolina are both signatories to the CRA and thus will protect it, US Br. 20 n.3, this is simply incorrect. Neither State is a CRA signatory, and South Carolina has "equivocated on whether it intends to challenge the CRA in the action." First Interim Report at 30, *South Carolina* v. *North Carolina*, No. 138 Orig. (Nov. 15, 2008) ("*Interim Report*").[1] Moreover, the CRA is a carefully negotiated compromise; if the equitable apportionment dislodges any part of it, the rest may come undone, threatening the years of work and the substantial

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[1] Both States have agencies which signed the CRA, and the question whether these signatures bind the States themselves has not been decided

investments that underlie Duke's application for license renewal.

This Court's precedent fully supports Duke's intervention. And, the Special Master decision in *Nebraska* v. *Wyoming*, No. 108 Orig., that both South Carolina and the United States rely on in arguing that FERC licensees on rivers should not be permitted to intervene in original equitable apportionment actions, see SC Br. 22-23, US Br. 20 n.3, was in fact *reversed* later in that litigation by that same Special Master when he recognized that no State party fully represented the licensee's specific interests in the flow of the Laramie River. See Seventeenth Memorandum of Special Master on Petition to Intervene of Basin Electric Power Coop., *Nebraska* v. *Wyoming*, No. 108, Orig. (Apr. 2, 1999) (Docket No. 1352) ("*Seventeenth Mem.*") (attached as Addendum). That licensee assumed full party status and was a signatory to the final settlement of that original case. See *infra* at 23-24. The same result should obtain here. This is a matter that should neither be litigated nor settled without Duke's direct participation.

With reservoirs, facilities and customers located in *both* Carolinas, control over the flow of the Catawba, and a FERC license up for renewal based on a web of agreements about the Catawba's flow, Duke's interests are not adequately protected by either State. Duke's interests in the Catawba Basin are region-wide. Duke is not interested in either State's maximization of its share of the River. And, because Duke's interests in the Catawba River are unique, allowing Duke's intervention does not open the intervention door to any citizen who uses the River.

In this setting, the Special Master correctly found that Duke should be permitted to intervene because

it has shown a "compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam). Moreover, because of its interests and experience, Duke as a litigant can substantially assist the Court and the Special Master in evaluating the complex issues posed by this case. Duke respectfully requests that the *Interim Report* be adopted and that this Court grant its motion to intervene.

STATEMENT OF THE CASE

1. From 1958 to 2008 (and by FERC extension to the present), see *Duke Power Co.*, 20 F.P.C. 360 (1958) (order issuing license), Duke and its predecessor companies have been licensed to operate a hydroelectric project along the Catawba River. That project now embraces eleven reservoirs located in North and South Carolina to provide hydroelectric power and other benefits to the region. *Interim Report* 3. Duke will not repeat the Statement of South Carolina that details the importance and historic development of the Catawba River basin in both States, and the origins of this original action. Instead, this Statement will provide only the background essential to Duke's motion to intervene.

In the early 20th century, Duke's predecessor, which later became known as Duke Power Company, was founded to provide electric power in the Piedmont region. In 1958, the Federal Power Commission issued to Duke Power Company a 50-year license under Section 4(e) of the Federal Power Act "for the construction, operation and maintenance" of hydroelectric facilities along the Catawba River in

North and South Carolina that constitute Project No. 2232 ("the Project").

The license was expressly made "subject to the terms and conditions of the Act" and "to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act." 20 F.P.C. at 368. The license also required Duke to maintain and grant passage over Duke property to permit public access to each lake created by the Project, *id.* at 370-71. Finally, the license required Duke to release certain minimum water flows at each development in North and South Carolina for purposes specified and in consultation with relevant State agencies. *Id.* at 371-72. (For example, the required minimum average daily flow from Wylie Dam, releasing water into South Carolina, is 411 cubic feet per second ("cfs"). NC App. to Brief in Opposition to South Carolina's Motion for Leave to File Bill of Complaint ("NC App.") 58a.) Duke's initial license expired in August 2008, and Duke is now operating under an interim license. See FERC, Project No. 2332-522, *Notice of Authorization for Continued Project Operation* (Sept. 18, 2008).

Duke's reservoirs along the Catawba allow Duke both to generate hydroelectric power at thirteen hydroelectric generating plants and to supply cooling water for its nuclear power and coal-fired plants in the Catawba basin. Duke's reservoirs effectively control the flow of the Catawba River for these purposes and to control flooding and address drought. Duke's reservoir at Lake Wylie is the source of the Catawba water that flows into South Carolina. See NC App. 1a-5a.

In February 2003, Duke began preparations for applying to FERC for the relicensing of its Project. As North Carolina's brief and declarations in

opposition to the South Carolina's motion for leave to file a bill of complaint ("NC Br.") explain, Duke sought to include all relevant state and private parties to create a consensus concerning the terms for obtaining its new license. NC Br. 2-3. Three years of negotiations led to the 2006 Comprehensive Relicensing Agreement ("CRA") signed by Duke, its corporate parent, and 68 other entities, including the North Carolina Department of Environment and Natural Resources, the South Carolina Department of Natural Resources, other state agencies, public water suppliers, county and municipal governments from both States, industries, interest groups, and individuals. See *id.* at 3. The CRA was not signed by either North or South Carolina.

The CRA is a formal request to FERC to grant Duke's new license under the terms and conditions set forth in that Agreement. *Id.*; see also NC App. 6a, 57a-58a. Duke's actions in securing the CRA served FERC's strong policy favoring the settlement of issues related to the licensing of FPA projects. See Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act, 71 Fed. Reg. 56,520, 56,520 (Sept. 27, 2006) (policy statement) ("Commission looks with great favor on settlements in licensing cases").

It was time-consuming, expensive, and difficult for stakeholders in the Catawba River basin to reach agreement on the proposed terms for FERC's issuance of Duke's new license – a license that Duke must obtain in order to continue to conduct its operations under the FPA. And, many of the provisions of that new license will involve factors that, as explained below, are directly relevant to the equitable-apportionment analysis. For example, the CRA would establish the minimum continuous flow

from Lake Wylie in a variety of settings, from sustained inflow periods (1,300 cfs), to no drought (1,100 cfs) through Stage 1 (860 cfs), Stage 2 (720 cfs), and Stages 3 and 4 (700 cfs) drought conditions. NC Br. 3-4; NC App. 57a-58a, 7a. This represents a significant increase from the 411 cfs minimum average daily flow required under the current license.

The CRA also establishes a Low Inflow Protocol ("LIP") for entities that use or withdraw water from the Catawba. See NC App. 6a-7a, 58a. The protocol requires certain entities in both North and South Carolina to take increasingly stringent conservation measures as drought conditions become more severe. *Id.* The LIP was voluntarily put into effect in August 2006, ahead of the date specified in the CRA. As one of South Carolina's climatologists recently stated, after five counties within the Catawba Basin had their drought status downgraded from severe to moderate, "'[t]he key to that downgrade is the Low Inflow Protocol.' . . . 'That was the driving factor.'" John Marks, *Duke System Helps Drought*, Lake Wylie Pilot, Feb. 21, 2009, *available at http://www.lakewyliepilot.com/409/story/283655.html*.

Duke filed its license application with FERC on August 29, 2006. As noted, FERC has not ruled on that application, and Duke is under an interim license. If the application for a license is accepted and the terms of the new license go into effect, the issues of equitable apportionment confronting this Court and the Special Master will have to be addressed in the context of the new license's minimum daily flow and other requirements.

Numerous businesses and communities in the Catawba basin rely on the River and on Duke's hydroelectric facilities and other operations. All parties agree that the Catawba, including the power

generated by Duke's facilities, is critical to the economies and communities of the basin now and for the foreseeable future. All parties further agree that the region has been periodically subject to drought, with damaging consequences for the Catawba's flow. These considerations were crucial in the multi-party negotiations that led to the CRA and its LIP submitted to FERC by Duke. The same considerations will be central to the equitable-apportionment analysis of this Court.

2. Although North and South Carolina have long worked out their differences concerning the Catawba River, the severe drought that occurred from 1998 through 2002, and subsequent drought conditions, led to the initiation of this lawsuit. Both North and South Carolina have statutes that permit state agencies to authorize transfers of water from one river basin to another. See N.C. Gen. Stat. § 143-215.22L; S.C. Code Ann. §§ 49-21-10 to -80. North Carolina, through its Environmental Management Commission ("EMC"), has utilized its authority under its Interbasin Transfer Statute to approve transfers of water from the Catawba River to other river basins.

On January 10, 2007, the EMC granted in part an application for a transfer of water from the Catawba over the objection of South Carolina. SC Br. 6. On June 8, 2007, South Carolina filed its motion for leave to file the bill of complaint, seeking an equitable apportionment of the Catawba River.

This Court granted South Carolina's motion on October 1, 2007. Duke then sought to intervene pursuant to this Court's Rule 17 because any equitable apportionment of the Catawba River will directly affect Duke's legal rights, contract and property interests, obligations, and operations in

connection with the waters of that River. Duke's motion, along with motions to intervene from the Catawba River Water Supply Project ("CRWSP") and the City of Charlotte, North Carolina ("Charlotte") were referred to the Special Master.

3. After full briefing and a hearing, the Special Master issued a decision concluding that Duke should be permitted to intervene. The Special Master described Duke's unique compelling interests in defending the terms of its current license and the CRA. See *Interim Report* 30-31. She stated that "there is a strong possibility that the terms agreed to by the relevant stakeholders in the CRA will be directly at issue in this litigation, thus triggering Duke's direct interest in preserving that agreement and its existing and prospective licenses." *Id.* at 30. She also reasoned that "[i]f the scientific data and conclusions that support the CRA, which in turn is the principal support for Duke's license application, will be placed in issue, it would seem fair and equitable to allow Duke to defend those data and conclusions, as well as the CRA and the license application themselves." *Id.* at 31.

The Special Master recognized that Duke's hydroelectric plants and reservoirs "effectively control the flow of the Catawba." *Id.* at 28. The Report explained that "because Duke controls the flow of the Catawba River . . . any Court-ordered alteration of the flow would be carried out by Duke and would directly affect its operations." *Id.* at 29; see *id.* at 11 (the CRA's "flow requirements—and not solely the uses of water by North Carolina immediately govern how much water from the Catawba makes its way into South Carolina").

The Special Master found the combination of Duke interests compelling and sufficient to warrant Duke's

intervention, and further noted that Duke's participation would "provide a direct link to the CRA negotiations process and the FERC proceedings that will foster 'a full exposition of the issues.'" *Id.* at 30.[2]

After the Special Master issued her decision, the parties began negotiating a Case Management Order. In addition, document discovery began. South Carolina served comprehensive document requests on Duke, which illustrate the extent to which Duke's interests are broadly affected by this case.

Thereafter, South Carolina filed a motion requesting that the Special Master clarify that Duke, CRWSP, and Charlotte were intervenors "solely for limited purposes." SC Mot. 2 (emphasis omitted). If the Special Master's Order granting intervention were interpreted to allow Duke a more robust role, including participation in the liability phase of the proceedings, then South Carolina asked that the Order be reconsidered and that intervention be denied. *Id.* The Special Master denied that motion on July 17, 2008.

On August 22, 2008, the Special Master granted South Carolina's request that she submit an Interim Report addressing intervention to this Court. In that Report, the Special Master explained her denial of South Carolina's motion for clarification or reconsideration. She stated that while Intervenors surely had an interest in the outcome of this action,

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[2] The Special Master declined to make Duke's role in serving the public interest as a FERC licensee a "factor" in her decision authorizing intervention because she concluded that Duke serviced the public interest solely by complying with its License. *See Interim Report* 31 n.3. Duke continues to believe the public interests served by its license support its argument that its interests are compelling. *See infra* at 32-33.

that did "not mean that the[ir] only interest . . . is in the remedial phase." *Interim Report* 34. "Rather, as with any litigant, they have an interest in the liability proceedings that could lead to the adverse result . . . ." *Id.* In addition, she pointed out that Intervenors would have an interest in whether South Carolina had shown in Phase I (the liability phase) that it was suffering harm "from the Intervenors' own activities." *Id.* at 34-35.

The Special Master recognized that Intervenors are limited to the extent that their "participation . . . should be directed toward protecting that intervenor's interests and not as a means to litigate all aspects of the dispute, even those that do not affect the intervenor." *Id.* at 34. She indicated that she would address particular objections to Intervenor participation beyond the reasonable limits imposed by their interests through case management. *Id.*

SUMMARY OF ARGUMENT

Where, as here, a private party has "compelling interest[s]" that are not adequately represented by a party state, that party is permitted to intervene in an original action that will directly affect those interests. *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam). The Special Master correctly concluded that Duke has a unique and compelling amalgam of interests, rights and obligations related to the waters of the Catawba River that are not adequately represented by either party State. These interests would be directly affected and are potentially endangered by any equitable apportionment of the Catawba River, and can only effectively be protected by allowing Duke to intervene as a party to this dispute.

In response, South Carolina and the United States argue that the Special Master derived the incorrect test from this Court's prior decisions and wrongly determined that Duke should be permitted to intervene. First, South Carolina is simply wrong when it claims that the Special Master ignored the requirement that no state adequately can represent the putative intervenor's interests. Instead, she rightly concluded that under this Court's cases, a private party may intervene even where it does not have a disabling conflict of interest with a party state.

In addition, the Special Master correctly found that this Court's decisions authorizing intervention, including *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), and *Arizona* v. *California*, 460 U.S. 605 (1983), apply to equitable apportionment cases and strongly support Duke's intervention here. South Carolina and the United States rely on the Special Master's exclusion of the hydroelectric licensee, Basin Electric, from the original action apportioning the North Platte River in this Court; but that case ultimately supports Duke's intervention here. When it became clear that the Laramie River's flow and Basin's water rights were implicated by the apportionment of the North Platte, the Special Master reversed himself and granted Basin's motion to intervene. See *infra* at 23-24. Basin was a party to the final resolution in *Nebraska* v. *Wyoming*, 534 U.S. 40 (2001). Duke's situation is closely analogous to Basin's.

The arguments objecting to Duke's intervention are without merit. North Carolina cannot adequately represent Duke's interests, which involve the entirety of the Catawba basin and do not seek to increase either State's portion at the expense of the other.

Instead, Duke seeks to represent its wholly separate and compelling interests in the Catawba – its bi-state reservoir operations, its investments in the compromise of the CRA and the relicensing process, its FERC license and its impounded waters. North Carolina has no analogous stake in any of these items. Nor, properly understood, can these interests be categorized as those of a mere water user in a single state. Duke does not seek to intervene to protect or increase its share of water, but to preserve and fulfill the conditions of the CRA and its FERC license, with the multiplicity of uses and understandings embodied therein.

Finally, none of the factors that often militate against intervention applies to Duke, and Duke is situated to be both helpful to the proceedings and essential to any remedy. Duke's unique circumstances and interests ensure that its intervention will not open the door to others. It does not seek to litigate claims beyond those already in the case or to address matters that do not relate to its specific interests. And Duke's management of the CRA process provide it with resources and information that are directly relevant to the equitable apportionment question (and that reveal the direct impact of any equitable apportionment on Duke's interests). In these circumstances, the Special Master's determination that admitting Duke as a party was warranted and would materially assist her conduct of this litigation was fully supported. Her recommendation should be accepted and Duke's motion should be granted.

ARGUMENT

THE SPECIAL MASTER'S DECISION IS CORRECT AND DUKE'S MOTION TO INTERVENE SHOULD BE GRANTED.

This Court has recognized that parties other than states and the United States may have "compelling interests" that are not represented by a party state, and that those parties should be permitted to intervene in original cases that will directly affect that interest. *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam). In opposing Duke's intervention, South Carolina and the United States argue that (i) the Special Master applied the wrong legal standard for intervention, and (ii) under the correct standard, Duke's motion should be denied. Both arguments are wrong.

A. The Report Uses The Correct Standard.

1. The Special Master Did Not Invent A New Test For Intervention.

Both South Carolina and the United States spend a number of pages demonstrating that intervention by private parties in original actions is unusual and that intervenors must satisfy the *New Jersey* test. Neither the Special Master nor Duke has any quarrel with that standard.

Unhappy with the Special Master's careful reading of this Court's cases and her application of the *New Jersey* test for intervention, however, South Carolina and the United States seek to persuade this Court that the Special Master invented a new test for intervention that omits consideration of whether the putative intervenor's interest is "adequately represented" by a party state. A fair reading of the

Interim Report reveals that this accusation is baseless.

First, the Special Master recites the *New Jersey* test, *Interim Report* 13, highlighting the requirement that the putative intervenor's interests must be "'apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.'" *Id.* (quoting *New Jersey*, 345 U.S. at 373).

In applying her distillation of the case law, the Special Master specifically discussed the requirement that the "proposed intervenor" not be "'properly represented by the state.'" See, *e.g.*, *id.* at 23 (quoting *New Jersey*, 345 U.S. at 373). It was in this context that the Special Master stated that in order to grant intervention, the Court does *not* require a "conflict of interest or some other disabling factor that would prevent the party state from representing the proposed intervenor's interests." *Id.* at 23. This is *not* a rejection of the no-adequate-state-representation requirement. It means only that the Court can find (and has found) that a state does not adequately represent a private party's interests without finding a disabling conflict of interest. Put differently, a state can be an inadequate representative of a private party's interests even without any directly conflicting interest where the intervenor has "'concrete'" interests that are not fully represented by a party state. See *id.* at 13 (discussing *New Jersey*, and this Court's statement that Philadelphia was denied intervention because it was "'unable to point out a single concrete consideration in respect to which the Commonwealth's

position does not represent Philadelphia's interests'").[3]

Thus, the Special Master read this Court's cases to hold that, even when a putative intervenor has some interests that "align" with those of a party state, on occasion a non-state party has an interest that is unique and so compelling that the party state does not adequately represent that non-state party's interests. And, she recited as potential examples circumstances where the non-state entity (i) is the "instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief," (ii) has "an independent property interest that is directly implicated by the original dispute or a substantial factor in the dispute," or (iii) has "a 'direct stake' in the outcome of the action." *Id.* at 21.

In doing so, the Special Master was neither rejecting the no-adequate-state-representation requirement nor suggesting that intervention is warranted any time one of these conditions is met. Instead, she was explaining the types of compelling specific interests which this Court has found may not be adequately represented by the *parens patriae*.

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[3] South Carolina cites the quoted language in its argument (Br. 26) that this Court intended to require a disabling conflict of interest in order to permit intervention. But, the Special Master concluded that the requirement of a "concrete consideration" demonstrating difference falls far short of a requirement for a disabling conflict of interest. For example, in *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981), the oil pipelines permitted to intervene were the entities that suffered under the illegal tax and they were perceived to have an interest sufficiently different from that of the party states to warrant intervenor status in light of the directness of the injury.

The Special Master applied the standard for intervention set forth in *New Jersey*, including the requirement that no state party adequately represent the putative intervenor's interest. Both South Carolina and the United States disagree with the Special Master's view about how that factor applies to specific cases (a separate issue addressed *infra*). But the argument that the Special Master simply ignored a relevant factor is wrong.

2. The Standard For Intervention In Equitable Apportionment Actions Is Identical To That In Other Original Actions.

(a) Before the Special Master, South Carolina argued that intervention by non-sovereigns is *never* allowed in equitable apportionment cases. In this Court, South Carolina has softened its stance, arguing that the already-stringent standard for intervention in original actions is further heightened in equitable-apportionment cases. SC Br. 21. As the Special Master concluded, there is no legal or factual basis for asserting that equitable apportionment cases differ from other original actions such that intervention should be more difficult. See *Interim Report* 24 ("There is no special rule applicable only to equitable apportionment cases ....").

The Court has limited non-state parties' intervention in original actions in order to protect the states' Eleventh Amendment right not to be sued by private parties absent consent and to prevent original actions from becoming unwieldy class actions. See, *e.g.*, *Arizona* v. *California*, 460 U.S. 605, 614 (1983); *New Jersey*, 345 U.S. at 374-75. These concerns are equally important in all original cases. South Carolina seeks to narrow this Court's intervention test in the equitable-apportionment setting because

this Court's decisions granting intervention in other types of original actions strongly support Duke's intervention here.

For example, in *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981), eight states filed an original action against Louisiana, asserting that a tax that it imposed on natural gas shipped into the State was invalid. The Court allowed 17 natural gas pipeline companies subject to the tax to intervene, explaining:

> Given that the Tax is directly imposed on the owner of imported gas and that pipelines must often own the gas, those companies have a direct stake in the controversy and in the interest of a full exploration of the issue, we accept the Special Master's recommendation that the pipeline companies be permitted to intervene, noting that it is not unusual to permit intervention of private parties in original actions. [*Id.*][1]

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[1] South Carolina seeks to distinguish *Maryland* v. *Louisiana* on the ground that the pipeline-intervenors were incorporated and maintained principal places of business in non-party states. SC Br. 34-35. But that was not the basis for the Court's decision granting intervention; it was instead the pipelines' direct stake in the controversy based on the imposition of the tax on their operations in the party state. And it was that direct stake that made the party state's representation inadequate, not the pipelines' incorporation elsewhere. The United States insinuates that sovereignty interests are somehow more important in an equitable apportionment case than in a case asserting unlawful taxation. US Br. 15-16. This argument is neither intuitively obvious, nor supported by the cases. Clearly, states feel impingements on their sovereign prerogatives in multiple areas, including boundary disputes, taxation, and water division.

See also *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922) (granting intervention to private parties whose lands were directly affected by a boundary dispute).[5]

These cases are directly on point. For over 100 years, Duke has impounded and controlled the flow of water in the Catawba in both Carolinas. Any equitable apportionment will be directly imposed on Duke's impounded water and its operations. Equally to the point, Duke's compelling interests are threatened by any equitable apportionment that is inconsistent with either its FERC license or with the CRA that is the fundamental basis of Duke's application for license renewal.

South Carolina and the United States also derogate Duke's reliance on *Arizona* v. *California*, which is an equitable apportionment case in which intervention of non-state parties was allowed. They claim that the Court authorized intervention solely as a result of the intervenor tribes' sovereign nature. SC Br. 23; US Br. 15. But, this Court's decision makes clear that the tribes were permitted to intervene because their "interests in the waters of the Colorado basin have been and will continue to be determined in this litigation." 460 U.S. at 614-15. Duke is in a position directly analogous to that of the tribes. It has special rights and obligations in the Catawba under its FERC license, the CRA and state law. And, unlike

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[5] South Carolina argues that it can distinguish *Oklahoma* v. *Texas* as well as other original cases involving real property in which intervention by property owners is authorized. SC Br. 32-33 & n.23. The problem is that nothing in these cases suggests that the intervention was granted because real property was at stake. Indeed, *Oklahoma* v. *Texas* is inconsistent with South Carolina's claim (*Id.* at 32-33) that intervention is permitted only when the non-state party's interest is in conflict with that of the state.

the tribes, which were represented by the United States when they intervened, *id.*, no party represents Duke's interests here.

Although South Carolina and the United States seek to pigeonhole each case allowing intervention to its particular circumstances, the overall significance of the relevant body of cases is that intervention is permitted if the *New Jersey* test is satisfied and the putative intervenor is not attempting to expand the claims before the Court. Duke satisfies the framework of *New Jersey* and surpasses the requirements as applied in *Maryland* v. *Louisiana*, *Arizona* v. *California*, and *Texas* v. *Oklahoma*.

South Carolina and the United States attack the Special Master for supporting her decision by citing original cases in which non-state parties were joined by means other than intervention. SC Br. 29-31; US Br. 17-19. The context of the Special Master's analysis is directly relevant here; she was addressing South Carolina's argument that intervention is never appropriate in equitable apportionment cases. These cases demonstrate that there is no constitutional barrier to third-party participation in such cases. Moreover, the Interim Report recognizes that there is a distinction between intervention and joinder, but cites these cases to highlight that (i) there is no constitutional barrier to the presence of non-state parties in equitable apportionment actions within the Court's original jurisdiction so long as the complaint is not thereby expanded beyond the inter-state conflict, and (ii) the Court could have excluded these non-state parties had it concluded that their presence did not further the litigation. See *Interim Report* 16-17, 38-39. The presence of non-state parties in original equitable apportionment cases, in fact, suggests that this Court defers to the Special

Master's judgments about the importance of those parties' interests and the efficient conduct of the litigation, at least where there is no constitutional objection to the non-state party's presence.

(b) South Carolina and the United States also argue that this Court's discussion of the rights of private water users vis-à-vis the States demonstrates that the standard for intervention in equitable apportionment actions is higher. For example, they argue that the state-law rights of a "'private appropriator'" of water within a state "'can rise no higher than those [of the State] and an adjudication of the [State's] rights will necessarily bind him.'" SC Br. 24 (second alteration in original) (quoting *Nebraska* v. *Wyoming*, 295 U.S. 40, 43 (1935)); see also US Br. 11-12.

These cases do not suggest any alteration in the standard for intervention by private parties; they show only that a mere water user does not meet the *New Jersey* standard. As we have shown, however, Duke is not simply an intrastate water user, whose rights and interests can be protected by state law and intra-state allocations in response to an equitable apportionment order, as our opponents' briefs suggest. See also *infra* at 33-35. Duke's interests are inter-state and federal in nature; neither its FERC license nor the CRA nor its impounded waters are the subject of any intra-state dispute. These cases simply have no application to Duke.

South Carolina and the United States return to this point in arguing that the Special Master has misread the Court's cases allowing joinder of instrumentalities authorized to carry out the wrongful conduct challenged by a plaintiff state. See SC Br. 28-29; US Br. 17-19. They claim that such non-state entities ceased to be joined to equitable apportionment cases

after this Court clarified that "'individual water claimants'" are bound by decrees affecting the party states. SC Br. 29. But, Duke is not seeking to intervene as an intra-state water user or claimant. And, Duke's role as the instrumentality of the alleged wrongful conduct is critical here: Duke controls the flow of the Catawba into South Carolina pursuant to its FERC license. If South Carolina claims that it is not receiving enough water, that is because the flow through Duke's Lake Wylie reservoir – a flow determined by its federal license and the CRA – is allegedly insufficient. If this Court orders an equitable apportionment that differs from its FERC license, Duke will face conflicting federal mandates. Duke will defend the terms of its federal license and the CRA and argue against inconsistent apportionment under federal common law. Those arguments should be heard by the Court before any decision concerning equitable allocation is made. Duke's operations on the River under its FERC license are directly affected by this proceeding.

(c) Finally, in arguing that intervention in equitable apportionment cases is different, South Carolina places new and particular reliance on the Court's affirmance of the First Interim Report of the Special Master in *Nebraska* v. *Wyoming*, 507 U.S. 584 (1993). SC Br. 22. That Report recommended denial of the motions to intervene of a number of non-state parties, including the Wyoming-based Basin Electric Power Cooperative ("Basin" or "Basin Electric"), on the ground that Wyoming could represent Basin's interests. *Id.* In fact, this case strongly supports Duke's motion.

In 1988, Basin Electric first sought to intervene in the apportionment of the Platte River "to protect its water rights in the Laramie River, a key tributary [of

the Platte], associated with the Grayrocks Dam and Reservoir, opened in conjunction with Basin's large coal-fired power plant." Final Report of the Special Master at 12, *Nebraska* v. *Wyoming*, No. 108, Orig. (Oct. 12, 2001) ("*Final Report*"). The Special Master denied this motion. But in 1993, this Court "opened the door for Nebraska to bring a modification case to achieve an apportionment of the lower Laramie River between the State of Wyoming and the State of Nebraska." *Seventeenth Mem.*, Add. 4. This decision, in turn, made the Laramie River and a 1978 Settlement Agreement between Nebraska, Basin and the United States concerning the flow of the Laramie relevant to the North Platte case. *Id.*

As a result, the Special Master found that

> the Court's decision in 1993 suggests that we will proceed to trial on Laramie River issues, that Basin's operations on the Laramie and its stake in Laramie waters are key to the disposition of those issues, that neither Wyoming nor Nebraska can adequately represent Basin as *parens patriae*, and that evidence Basin can offer may be important to crafting the final decree in this case and to my recommendations whether the Court should in some manner incorporate the 1978 Settlement Agreement into the North Platte decree. [*Id.*, Add. 4-5.]

The Special Master thus found that Basin had a "direct stake" in the apportionment and *granted* Basin's renewed motion to intervene as "a party for the purpose of litigating the Laramie River issues in this action" and noted that it "play[ed] an important role" in the action. *Final Report* 12; *id.* at 3 n.4 (citing *Seventeenth Mem.*). See *id.* at 21 ("[i]n March of 1999, I finally permitted Basin Electric to intervene as a party for the limited purpose of

protecting its interests in the Laramie River, where it operates the Grayrocks Reservoir and its associated electric generating station) (citing Order (Mar. 26, 1999) (Docket No. 1348)). Indeed, the Master noted that "[h]ad this action gone to trial, Basin Electric would have played a key role on the Laramie River issues, which became important after the 1993 Court opened the door to possible relief for Nebraska on the lower Laramie." *Id.* Basin is a party signatory to the Final Settlement Agreement endorsed by the Special Master, and approved by this Court in 2001. See 534 U.S. at 40-41.

Duke's situation is closely analogous. Indeed, its status as a licensee for power generation and controller of the River's flow, and its significant interests in a possible settlement agreement uncannily resemble the circumstances that resulted in Basin's intervenor status.

B. Duke Has Compelling Interests Not Represented By Either Party State That Would Be Directly Affected By Equitable Apportionment Of The Catawba River.

In addressing equitable apportionment, this Court applies federal common law. See *Virginia* v. *Maryland*, 540 U.S. 56, 74 n.9 (2003). This Court will make "an informed judgment on consideration of many factors." *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945). This Court's oft-quoted enumeration of apportionment principles provides a sense of the complexity of the inquiry:

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors .... [P]hysical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of

> return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former – these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made. [*Id.*]

Duke's pervasive presence on the River now and for more than 100 years – its facilities, operations and water use – will play a central role in virtually every factor of the equitable apportionment inquiry. Its current and new FERC license will color any assessment of the relative benefits and costs of Duke's water control and usage at multiple locations on the River in order to serve the businesses and communities dependent upon Duke's operations. The terms of that license will govern the minimum flow of the River in a variety of circumstances. An assessment essentially identical to that made in equitable apportionment has recently been conducted by Duke and 68 other Catawba stakeholders in negotiating the CRA. Duke invested substantial time and millions of dollars in this process, demonstrating its compelling interest in both its FERC license renewal and in all decisions affecting the flow and use of the Catawba.

Moreover, although the Court interprets and creates federal common law in apportionment cases, state law does provide a source for principles that the Court uses to craft that common law. See, *e.g.*, *Connecticut* v. *Massachusetts*, 282 U.S. 660, 670-71 (1931) (Court's equitable apportionment is based in

part "upon a consideration of the pertinent laws of the contending States and all other relevant facts"). Under North Carolina law, Duke, as an impounder of water, has "a right of withdrawal of excess volume of water attributable to the impoundment." N.C. Gen. Stat. § 143-215.44(a). That right, too, is potentially affected by an equitable apportionment that requires Duke to release excess impounded water. And, the use of impounded water is the only way to address the need to stabilize the flow of the Catawba.

South Carolina and the United States do not appear to deny that Duke controls the flow of the Catawba, that any Court-ordered alteration of the flow would be carried out by Duke, that Duke has a strong interest in defending its FERC license, the CRA and its efforts to obtain a license renewal, and that Duke would be subject to conflicting obligations if any apportionment conflicts with the CRA or its license. Instead, they make a series of arguments seeking to minimize those interests.

1. Duke's Interests Are Not Adequately Represented By North Carolina.

First, South Carolina claims that Duke's interests in protecting the CRA and in its license renewal are fully represented by North Carolina. SC Br. 47. North Carolina supports Duke's application for license renewal under the terms of the CRA, but North Carolina is not seeking a FERC license. North Carolina did not spend millions developing the consensus necessary to apply for license renewal.

If the equitable apportionment conflicts with the CRA, and affected signatories – including North Carolina entities – walk away from that Agreement, it is not North Carolina that faces a threat to its license renewal and operations. Duke has a property

interest in its current license, which North Carolina does not; and Duke has compelling interests in securing a renewal of that license, which North Carolina does not fully share.

South Carolina makes much of North Carolina's citations of the CRA. But North Carolina cited those provisions, and their proposed protection of certain minimum flows into South Carolina, as a reason for this Court to deny the motion for leave to file a bill of complaint (because the CRA would provide South Carolina with adequate flow). North Carolina certainly did not characterize the CRA as the correct resolution of any equitable apportionment case. If the CRA is called into doubt by these proceedings, North Carolina will likely seek to maximize its portion, just as South Carolina – not a signatory to the CRA, *supra* at 2 – surely will.

South Carolina states that if North Carolina seeks to maximize its portion, that "raises an intramural dispute between Duke and North Carolina over how North Carolina law will apportion that State's equitable share of water among its users." SC Br. 48. Nothing could be further from Duke's meaning. The CRA does not allocate water for Duke's use; it establishes requirements for the flow of the River at various stages of low flow or drought, and it reflects assumptions about appropriate uses by others over the length of the Catawba in both States during a variety of conditions.

In fact, Duke is arguing that both North and South Carolina's efforts to maximize their allocations would disadvantage Duke *because it would threaten the consensus embodied in the CRA*. If North Carolina were to argue successfully that South Carolina is entitled to less than the CRA provides under the Low Inflow Protocol, then the consensus that led to the

CRA could evaporate and with it, a critical component of Duke's effort for FERC license renewal. The same loss of consensus could occur if South Carolina were to succeed in demonstrating that it was entitled to a greater flow than that provided in the CRA.[6]

Neither State has the stake that Duke has in preserving the multi-party consensus that is embodied in the CRA. Duke has reservoirs, public and private interests, customers and regulators in both States. Duke's position is that whatever equitable apportionment is ordered, the terms of the CRA – the product of a three-year process in which participants moved away from seeking simply to maximize their own positions and toward an acceptable interest-based compromise – should be protected so that Duke can maintain its operations in the Catawba basin.

That is why South Carolina's citation of *Kentucky* v. *Indiana*, 281 U.S. 163 (1930), see SC Br. 18, is wholly inapt. Indiana was deemed to represent the interests of all its citizens in the building of a bridge to Indiana, and thus its position that the bridge should be built was dispositive and binding on its citizens. For purposes of this analogy, Duke is akin to a person who is a citizen of both Kentucky and Indiana, subject to regulation by both States, with a federal

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[6] South Carolina claims that Duke's "status as a signatory to the CRA" would provide no practical limit on the number of potential intervenors. SC Br. 49 n.35. This would be true if Duke were merely a signatory. In fact, Duke initiated and will implement the CRA; and it is the basis of Duke's application for renewal of its FERC license. This fact makes the CRA far more critical to Duke than to other signatories and differentiates Duke from all other signatories, whose individual interests Duke does not purport to represent.

contract requiring him to build the bridge. Both the nature and federal source of its interests set Duke apart from the party States.

2. Duke's Interests In The CRA And Its FERC License Are Compelling And Justify Intervention.

South Carolina and the United States also argue that Duke's interests in the CRA and its pending FERC license are not sufficiently compelling to support intervention.

(a) *The CRA.* Initially, South Carolina claims that there is only a "hypothetical danger of a conflict between Duke's prospective license and equitable apportionment" and that "FERC's consistent practice has been to craft licenses so as not to intrude on any equitable apportionment." SC Br. 51. In fact, FERC is expected to act on Duke's license renewal during 2009, and before any equitable apportionment ruling by this Court. The danger, which is not hypothetical, is that the parties will seek an equitable apportionment that is inconsistent with Duke's current or future FERC license. Only Duke among the parties will be concerned with the relationship between the FPA and its regulations, its FERC licenses, and the federal common law governing equitable apportionment. Only Duke has a compelling set of rights and interests to protect that arises from its status as a federal licensee.

South Carolina next notes that the CRA does not purport to "control any of the disputed water consumption in North Carolina," *id.* at 51; but that fact does not diminish the direct relationship between the CRA and equitable apportionment. The CRA is a complex agreement based on a set of understandings about water use and management in North and

South Carolina; it does purport to address consumption issues in both States at various Stages of the LIP. It also sets rates of flow into South Carolina at various reservoir and drought levels. If the equitable apportionment disallows water uses on which the CRA is based or requires that South Carolina get a higher or lower daily flow rate than does the CRA, that apportionment will conflict with the CRA and the expected terms of the Duke federal license.[7]

South Carolina's further contention that its success in increasing its share will simply make it easier for Duke to "comply with its federal license obligations," *id.*, is plainly wrong for numerous reasons. First, this assumes that South Carolina will prevail and that the ultimate equitable apportionment, if any, will not award more water to North Carolina than the CRA contemplates that it will use. That is not the

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[7] Duke agrees that its interest in defending the "scientific data and conclusions" that underlie the CRA is not independently sufficient to support intervention and that FERC will evaluate the validity of the analysis underlying Duke's application. *See* SC Br. 52. But that science – which Duke knows best – is directly relevant to the CRA, the FERC license, and equitable apportionment. Thus, for example, South Carolina states that Duke's model predicted four months at LIP Stage 3, *id.* at 5, in fact, the model predicted six months, *see Application for New License*, Book 2, Volume 1, at PM&E 25 and PM&E 26. The model did not anticipate the extraordinary drought the region is now suffering; but, as noted, *supra* at 7, the LIP is effectively operating to reduce the drought's ill effects which was its primary purpose. In any event, Duke's substantial interests in the CRA and the FERC license independently support intervention and Duke's intimate knowledge of the water conditions will promote rather than hinder the efficient resolution of this dispute.

inevitable outcome of this case.[8] Second, South Carolina ignores that under the CRA, Duke has obligations to North Carolina as well as to South Carolina, and that any equitable apportionment that awards more water to South Carolina could easily be inconsistent with those obligations and disrupt the CRA and Duke's relicensing effort.

Finally, Duke does not yet know, *inter alia*, whether South Carolina is claiming that it will suffer substantial harm (and thus be entitled to seek an equitable apportionment) if the CRA is approved by FERC. Duke does know that South Carolina is pursuing this litigation despite the CRA and its endorsement by governmental entities in both North and South Carolina (though not by South Carolina itself). The logical inference from this is that South Carolina believes that it will suffer substantial harm even under an approved CRA. That places South Carolina directly in opposition to legitimate interests of Duke identified by the Special Master.

(b) *Duke's FERC License.* South Carolina and the United States try to persuade this Court that Duke's status as a FERC licensee is irrelevant to its motion to intervene. SC Br. 50; US Br. 20 n.3. Instead, they say, Duke has only a "parochial interest in controlling the Catawba River's flow in such a way as to maximize shareholder profits." SC Br. 50. Initially, Duke notes that this fact would not distinguish it from the gas pipelines permitted to intervene to challenge the energy tax at issue in *Maryland* v.

[8] In fact, under normal conditions, the CRA provides more than twice the flow that the current license sets for South Carolina; even in the worst-case, low-flow scenario, the CRA provides more flow into South Carolina than the current license establishes. *See supra* at 5-7.

Louisiana or the property holders permitted to intervene to protect their property interests in *Texas* v. *Oklahoma*. See *supra* at 18-19. The fact that Duke seeks to run its business profitably does not mean that Duke lacks compelling interests supporting intervention. But, in all events, this attempt to disparage Duke's interests as profit-seeking ignores its distinct role as a FERC licensee.

Under § 4(e) of the FPA, FERC is authorized and empowered to issue licenses, including licenses for dams, reservoirs, and other projects for the development of power from streams and other bodies of water. In doing so, the Commission, "in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife . . . , the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. § 797(e). See also *id.* § 803(a)(1); *id.* § 808(a); *Udall* v. *FPC*, 387 U.S. 428, 450 (1967) (FERC must determine whether a hydroelectric project will be in the public interest as a whole).

To implement this statutory mandate, FERC includes within its licenses numerous conditions and requirements that the licensee serve the public interest as defined by FERC. The FERC licensee, in turn, is bound by the FPA and by the terms of its FERC license. See *Alabama Power Co.* v. *FPC*, 128 F.2d 280, 293 (D.C. Cir. 1942) ("The grant of [the license] may be made subject to conditions appropriate to safeguard the interest of the public. Having received its license subject to such conditions, . . . the Company cannot shuck off its obligations as a licensee . . . .") (footnote omitted). See also 16

U.S.C. § 799; *id.* § 803(a)(1); *id.* § 808(a)(3)(B) (role of public interest in license renewal).

In light of this federal scheme and the particular licensing obligations imposed on Duke that directly affect the Catawba flow, it is simply wrong to contend that Duke's interests are neither compelling nor different from other users of the Catawba. As the Special Master in *Nebraska* v. *Wyoming* explained in concluding that Basin Electric had a "direct stake" and thus should be permitted to intervene in the equitable apportionment of the Platte River and its tributaries,

> Basin's operations on the Laramie and its stake in Laramie waters are key to the disposition of those issues, . . . neither Wyoming nor Nebraska can adequately represent Basin as *parens patriae*, and . . . evidence Basin can offer may be important to crafting the final decree in this case. [*Seventeenth Mem.* Add. 4-5.]

This analysis applies fully to Duke.

Federal law imposes on Duke specific rights and obligations in connection with its license, issued in the public interest, and gives Duke substantial concrete interests in the River. Duke's interests with respect to the Catawba are therefore both compelling and unique.

3. Duke Is Not Just Another Water User.

South Carolina and the United States attempt to dismiss Duke's interests as only those of any large water user. But, Duke plainly is not equivalent to "'[l]arge industrial plants'" or to a municipality located in a single state, or to other individual claimants within states seeking preservation or

enlargement of their shares of the river. SC Br. 47 (alteration in original). Duke is neither located within a single State, nor seeking to protect or enlarge its *share* of the River. In fact, Duke is seeking to protect and fulfill its FERC license and a delicate negotiated web of uses and shares in order to comply with the CRA and obtain renewal of its license.

South Carolina's contention that Duke's operational interests and interests in the CRA are "simply other ways of describing Duke's interests as a large water user" is wrong for similar reasons. SC Br. 49. The CRA is not simply about Duke's water use, as any perusal of its wide-ranging terms and conditions reveals.[9] Duke's interests are qualitatively different from those of an entity focused on keeping or increasing its water use.

The argument that Duke is a mere user of water also ignores Duke's rights and obligations as an impounder of water. In times of drought, the natural flow of the Catawba would result in only a trickle of water reaching South Carolina. There would be no water to apportion absent Duke's FERC-licensed dams and reservoirs. See, *e.g.*, NC App. 13a, 14a-15a. South Carolina, accordingly, is seeking the apportionment not of the natural flow of the Catawba River, but of waters available solely because they have been impounded by Duke's operation of its Catawba-Wateree project pursuant to its FERC license. As an impounder of water, Duke has concrete interests in that water – interests of

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[9] Portions of the massive CRA are appended to NC's brief in opposition to the motion for leave to file bill of complaint. Duke renews its offer to provide the Court with the document on CD or in hard copy if the Court wishes to review it.

ownership and management – that are determined and regulated by federal and state law. See *supra* at 25-26, 31-33. In a very real sense, it is only Duke and its federal license that make both the existence of this case and any remedy possible.

As the foregoing makes clear, Duke's peculiar interests, if recognized by this Court, could not conceivably open this case to intervention by significant numbers of Catawba water users or, indeed, any other private parties. No one is similarly situated or possesses analogous interests. Duke's particular interests – arising from its FERC license and the associated federal and public interests, including the CRA, its presence in both States, and its role as impounder of substantial quantities of water in both States – ensure that there is no one similarly situated or with comparable interests.

Moreover, if the Court were to allow other intervenors, Duke has been and is committed to coordinating with all parties to reduce any increased litigation burden resulting from the participation of private litigants. Duke's experience and knowledge with respect to the facts relevant to equitable apportionment is a benefit that outweighs any incremental burden from Duke's participation.

Duke's interests in the Catawba, indeed, are exceptional even among FERC licensees. The Catawba-Wateree project is massive, including eleven reservoirs and thirteen hydroelectric facilities throughout the River basin that runs through two States. Duke plainly is not just a very large user, as South Carolina and the United States imply. Its interests are both unique and uniquely important.

4. The Special Master's Determination That Duke's Intervention Would Be Beneficial Was Well Within Her Discretion.

Last, South Carolina and the United States make the straw man argument that Duke's possession of the information about the Catawba River's flow is not sufficient to permit intervention. SC Br. 53; US Br. 20 n.3. Duke made no such argument; it rested on the full set of interests articulated above, supplementing that showing with the point that its party status would facilitate the production of relevant information and expertise. Duke does not simply "possess information" about the Catawba's flow; its operations determine and control that flow and its license will determine its terms. And, Duke's participation is essential to the formulation and implementation of any remedy in this action. Duke manages the impounded water that would allow apportionment. And, Duke is bound by its federal license and its terms would have to be addressed in any apportionment. In light of these facts, neither *amicus* status nor receipt of a third party subpoena for document production (see US Br. 20 n.3) would protect Duke's interests.

In any event, the Special Master determined that she would benefit from the involvement of Duke as a party, both in conducting the litigation and in determining and implementing the remedy, if any. She correctly noted that Duke would "provide a direct link to the CRA negotiations process and the FERC proceedings that will foster 'a full exposition of the issues.'" *Interim Report* 30 (quoting *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21). Indeed, as the Special Master explained, "many of the same factors addressed in the [CRA] – such as natural flow,

existing uses, and effect of drought conditions – would be considered in an apportionment inquiry." *Id.* Where, as here, there is no constitutional impediment to a party's intervention, the Special Master should have discretion to decide that the litigation would benefit from a party's participation.

In sum, Duke has compelling interests that will be directly affected by any equitable apportionment of the Catawba and that are not adequately represented by either party State. In addition, Duke is uniquely situated to assist the States and the Court's exploration of all facts relevant to deciding the issues underlying equitable apportionment.

CONCLUSION

For the foregoing reasons, this Court should accept the Special Master's recommendation and grant Duke's motion to intervene.

Respectfully submitted.

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March 9, 2009

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No. 108, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING, *et al.*,
Defendants.

OFFICE OF THE SPECIAL MASTER

SEVENTEENTH MEMORANDUM OF SPECIAL MASTER ON PETITION TO INTERVENE OF BASIN ELECTRIC POWER COOPERATIVE

April 2, 1999

Add. 2

No. 108, Original

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1998

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING, *et al.*,
Defendants.

OFFICE OF THE SPECIAL MASTER

SEVENTEENTH MEMORANDUM OF SPECIAL MASTER ON PETITION TO INTERVENE OF BASIN ELECTRIC POWER COOPERATIVE

On March 26, 1999, I issued an order granting Basin Electric Power Cooperative's ("Basin") petition to intervene in this proceeding as a party for the limited purpose of protecting its water rights and equitable interests in the Laramie River.[1] This memorandum lays out the rationale for granting Basin's motion.

Basin filed its petition to intervene on August 13, 1998.[2] More than ten years into the case, participat-

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[1] Order (Mar. 26, 1999) (Docket Item No. 1318).

[2] Basin Electric Power Cooperative's Petition to Intervene, Memorandum in Support ("Basin's Memorandum") and Response to Nebraska's Amended Petition (Aug. 13, 1998) (Docket

ing actively as an *amicus curiae*, Basin takes the case as it stands. Basin's petition was opposed by the United States and the State of Nebraska, but the State of Wyoming acknowledged that Basin should be permitted to intervene if "Nebraska is allowed to pursue her changed position with respect to the [Missouri Basin Power Project] and if any party successfully challenges Wyoming's ability to raise Basin's contract defenses."[3]

Basin's petition comes against a backdrop of developments in the case, including water administration developments in Wyoming, a new Nebraska interpretation of the relationship between the 1978 Settlement Agreement[4] and the North Platte decree, the granting of summary judgment to the United States removing the Corn Creek issue from this case,[5] shifting alignments among the parties with the result that the United States is now approaching the issues more with Wyoming as a co-defendant than as a co-plaintiff with Nebraska, and an open door to considering an apportionment of the Laramie downstream of Wheatland, Wyoming, following the Court's opinions in 1993 and 1995.

Item No. 1232). Basin's Petition has been fully briefed and discussed during a telephone conference on November 4, 1998. *See* Transcript of Proceedings 11/4/98 (Docket Item No. 1290).

[3] State of Wyoming's Response to Basin Electric Power Cooperative's Petition to Intervene at 11 (Sept. 25, 1998) (Docket Item No. 1251).

[4] *See infra* note 6.

[5] *See* Sixteenth Memorandum of Special Master on the United States' Motion to Dismiss and Motion for Summary Judgment at 26, 32 (Mar. 26, 1999) ("Sixteenth Memorandum") (Docket Item No. 1347).

In 1993, the Supreme Court opened the door for Nebraska to bring a modification case to achieve an apportionment of the lower Laramie River between the State of Wyoming and the State of Nebraska.[6] The Court stated: "We express no view as to whether, upon a proper showing of injury, incorporation of the settlement agreement into the North Platte decree would be appropriate."[7] Thus, the Court left open a question that has become critical to the Laramie River issues in this case, namely whether protections and injunctions will be built into the North Platte decree at the conclusion of this proceeding to safeguard the rights secured by the 1978 Settlement Agreement.

Since that time, Basin has essentially been caught in the crossfire of litigation theories and strategies between the parties as described in more detail below.[8] The evolution of the case since the Court's decision in 1993 suggests that we will proceed to trial on Laramie River issues, that Basin's operations on the Laramie and its stake in Laramie waters are key to

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[6] *See Nebraska v. Wyoming*, 507 U.S. 584, 597-98 (1993). The Court was referring to an Agreement of Settlement and Compromise (Dec. 4, 1978) ("1978 Settlement Agreement") signed by several parties, including the United States, Nebraska, and Basin, but not by Wyoming. (The 1978 Settlement Agreement is attached to the Motion of the State of Wyoming for Summary Judgment and Brief in Support of Motion (Sept. 11, 1987) (Docket Item No. 23).) Wyoming's revised posture regarding that settlement agreement, discussed further below, is the reason for my granting the United States' motion for summary judgment with respect to the potential Corn Creek project on the Laramie River. *See* Sixteenth Memorandum at 25-26 (Docket Item No. 1347).

[7] *Id.* at 598.

[8] *See infra* pp. 7-10.

the disposition of those issues, that neither Wyoming nor Nebraska can adequately represent Basin as *parens patriae*, and that evidence Basin can offer may be important to crafting the final decree in this case and to my recommendations whether the Court should in some manner incorporate the 1978 Settlement Agreement into the North Platte decree. I have, therefore, concluded that Basin should be a party to these proceedings to represent its interests in the Laramie River Basin in order to protect its rights under the 1978 Settlement Agreement.

A. BACKGROUND

Basin is the project manager and operating agent of the Missouri Basin Power Project ("MBPP"), a consortium of consumer and publicly owned utilities supplying power in eight states, including Nebraska and Wyoming. In 1980, MBPP completed building the Grayrocks Reservoir on the Laramie River pursuant to Wyoming permits. Grayrocks Reservoir supplies water to the Laramie River Station, a large coal-fired steam electric power generating plant. During the 1970's, several parties sued in federal district court to enjoin the construction of the reservoir and power plant.[9] Wyoming was not a party to either of the two lawsuits involved in that challenge and did not, therefore, participate in the 1978 Settlement Agreement resolving that litigation and setting out terms and conditions that permitted the construction and operation of Grayrocks and the possible construction of Corn Creek.

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[9] *See* Sixteenth Memorandum at 7 (Docket Item No. 1347); *see also* Basin's Memorandum at 2-4 and footnotes therein (Docket Item No. 1232).

The 1978 Settlement Agreement[10] limited Grayrocks' consumptive use to 23,250 acre-feet per year, specified the water uses for the project, limited water intake structures in design and implementation for project purposes, and called for the measurement of releases and flows from Grayrocks Reservoir. Under the 1978 Settlement Agreement, Basin established a trust fund to set up *amicus* the Platte River Whooping Crane Critical Habitat Maintenance Trust to protect endangered and threatened species in the North Platte watershed. For the purposes of this proceeding, the most important terms of the 1978 Settlement Agreement require year-round releases of certain flows from Grayrocks Reservoir to the mouth of the Laramie River (section 4), and provide for a modification of those flows in the event the proposed Corn Creek project is built (section 5).[11]

Until recently, although Basin has made the required deliveries to the mouth of the Laramie River and has declared its intention to continue doing so, Wyoming refused to guarantee those releases.[12] In the past three years, however, that situation has substantially changed. In 1995, Basin applied to the Wyoming Board of Control to change the use of its appropriation for Grayrocks Reservoir, requesting a reallocation of uses for irrigation and fish and wildlife purposes. The state Board of Control granted the application on August 23, 1995. In 1997, Basin was awarded a secondary permit to protect agreed-upon water releases from Grayrocks Reservoir to the

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[10] *See supra* note 6.

[11] *See* Sixteenth Memorandum at 5-6 for a description of the Corn Creek project (Docket Item No. 1347).

[12] *See id.* at 19-26 for a history of these litigation postures and their impact on the proceedings.

mouth of the Laramie River. Finally, the Wyoming State Engineer has revised its water administration procedures for the lower Laramie River to protect the minimum flow releases set out in the 1978 Settlement Agreement.[13]

Because of Wyoming's changed stance toward Basin's water rights on the Laramie, I have granted the United States' motion for summary judgment on the Corn Creek issue.[14] I have also determined, however, that this resolution of the Corn Creek issue does not dispose of all Laramie River issues and that the door is open for Nebraska to seek to modify the North Platte Decree for a specific apportionment of Laramie lower flows beyond Grayrocks' protected releases under the 1978 Settlement Agreement.[15] I have further determined that the question of how Corn Creek depletions would be accounted for under the decree must be postponed to the time when Corn Creek is constructed and the parties fail to agree on accounting for its incremental depletions.[16]

This is the framework for admitting Basin as a party into these proceedings.

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[13] For more detailed descriptions of the recent Wyoming administrative developments favorable to Basin's contractual obligations under the 1978 Settlement Agreement, see Basin's Memorandum at 5-8 (Docket Item No. 1232); Nebraska's Response to Basin Electric Power Cooperative's Petition to Intervene at 10-13, exs. A-D (Sept. 25, 1998) (Docket Item No. 1252); Reply of Basin Electric Power Cooperative to Responses to Petition to Intervene at 4 (Oct. 2, 1998) ("Basin's Reply") (Docket Item No. 1256).

[14] *See* Sixteenth Memorandum at 17-32 (Docket Item No. 1347).

[15] *See id.* at 26, 32.

[16] *See id.* at 30-31.

B. ANALYSIS

There is a long and colorful history to Basin's efforts to intervene in these proceedings. Basin's first motion to intervene was filed on April 13, 1987.[17] In my Seventh Memorandum, I denied that motion without prejudice on April 1, 1998.[18] The standards for deciding on intervention in this original action are set out in the Seventh Memorandum and are incorporated by reference.[19] With respect to Basin in particular, I found its situation at the time to be analogous to that of the City of Philadelphia in *New Jersey v. New York*.[20] At that time, Wyoming declared itself ready and willing to defend Basin's interests and its "ability to use the Laramie River."[21] The common interest between Basin and Wyoming, according to Wyoming, rested on their shared view that the Laramie had been completely apportioned between Wyoming and Colorado[22] and that, therefore, "the Laramie River is exempt from apportionment in the decree."[23] That critical underpinning for Wyoming and Basin's position in this case disappeared in

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[17] Motion of Basin Electric Power Cooperative for Leave to Intervene, Memorandum in Support of Motion and Answer (Apr. 13, 1987) (Docket Item No. 14).

[18] Seventh Memorandum of Special Master at 8-12 (Apr. 1, 1998) ("Seventh Memorandum") (Docket Item No. 60).

[19] *Id.* at 2-4; *see also* Owen Olpin, Special Master, First Interim Report at 7-8 (June 14, 1989) ("First Interim Report") (Docket Item No. 140).

[20] *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

[21] Transcript of Proceedings 10/1/87 at 129 ("Salt Lake Transcript") (Docket Item No. 29).

[22] *See Wyoming v. Colorado*, 259 U.S. 419 (1922).

[23] Salt Lake Transcript at 42-43 (Docket Item No. 29).

1993 when the Court determined that all Laramie flows had not been previously apportioned.

I accorded Basin status as an active *amicus*,[24] and Basin has indeed been a regular and important participant in this proceeding, appearing at hearings and filing briefs and memoranda.

On March 29, 1989, Basin petitioned for reconsideration of its motion for leave to intervene or, in the alternative, renew its prior motion to intervene.[25] Basin had changed its mind about Wyoming being able to represent its interest because of Wyoming's stated position during oral argument on Wyoming's first motion for summary judgment that, although Wyoming would administer water released from Grayrocks in compliance with Wyoming water law, Wyoming would not guarantee administration under the terms of the 1978 Settlement Agreement.[26] I informed the Court that I would defer ruling on Basin's reconsideration motion until I firmly established Wyoming's stance.[27]

The evolving litigation stances of the parties in the following years and the evolution of the issues in the case suggested that Basin may indeed not be adequately represented by its nominal *parens patriae*, Wyoming. Rather, it seemed that because they were co-signatories to the 1978 Settlement Agreement, it

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[24] *See* Seventh Memorandum at 11-12 (Docket Item No. 60).

[25] Petition of Basin Electric Power Cooperative for Reconsideration of Its Motion for Leave to Intervene and of Certain Parts of the Decision Contained in the Tenth Memorandum of the Special Master (Mar. 29, 1989) (Docket Item No. 120).

[26] *See* Sixteenth Memorandum at 20-23 (Docket Item No. 1347).

[27] *See* First Interim Report at 13 (Docket Item No. 140).

was perhaps Nebraska and Basin that had a common interest in upholding the terms of that agreement, an interest not shared by Wyoming as a non-signatory.

Following the Court's determination in this case in 1993 that the Laramie River had not been fully apportioned in the Court's 1922 Laramie River decree in *Wyoming v. Colorado*[28] and that Nebraska could seek a North Platte decree modification with respect to the Laramie—thus rejecting the joint position of Wyoming and Basin that the Laramie had been fully apportioned—I alerted the Court to this change in Basin's position as the "child" of a *parens patriae*:

> During the course of these proceedings, it has become apparent that Wyoming and Basin Electric have opposing interests on some key questions .... Nebraska and Basin Electric have certain identities of interest, especially the notion of substantial injury to Nebraska on the Laramie on account of upstream developments. Thus, I have reopened the door for Basin Electric to petition to intervene as a party, but to date it has expressed contentment with its "position as the roving child of various parens patriae." July 27, 1994 Transcript at 230 (Mr. Weinberg for Basin Electric) (Docket Item No. 688).[29]

Basin nonetheless continued to appear content with its role as an *amicus*. On December 20, 1995, I issued an order directing Basin to describe its interests in Laramie River issues and explain how and by

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[28] *Wyoming v. Colorado*, 259 U.S. 419 (1922).

[29] Owen Olpin, Special Master, Third Interim Report on Motions to Amend the Pleadings at 21 n.52 (Sept. 9, 1994) (Docket Item No. 699).

which party those interests would be represented.[30] In response, Basin described its interests and stated that "each of its principal interests is shared by at least one party that can be expected to represent it adequately."[31]

Basin has now changed its mind and determined that it must intervene for the limited purpose of protecting its Laramie rights because of a new litigation stance Nebraska has taken concerning the relationship between the 1978 Settlement Agreement and the North Platte decree.[32] Following the Wyoming administrative changes that accorded protection of Basin's rights to make the necessary deliveries to the mouth of the Laramie under the 1978 Settlement Agreement,[33] Nebraska made clear its position that the settlement agreement did not affect the North Platte decree and that any depletions from the Laramie River for the MBPP project should be counted against Wyoming's 25% apportionment of the natural flows of the North Platte River in its pivotal reach between Guernsey Reservoir and Tri-State Dam.[34]

None of the parties can act as *parens patriae* for Basin in protecting its Laramie interests. At one time in this litigation, it appeared that Nebraska

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[30] Order (Dec. 20, 1995) (Docket Item No. 814).

[31] Basin Electric's Memorandum in Response to Special Master's Order of December 20, 1995 at 2 (Jan. 12, 1996) (Docket Item No. 824).

[32] *See* Basin's Memorandum at 8-9 (Docket Item No. 1232).

[33] *See* discussion *supra* pp. 5-6; Sixteenth Memorandum at 25-26 (Docket Item No. 1347).

[34] *See, e.g.*, Nebraska's Reply to State of Wyoming's Response to Basin Electric Power Cooperative's Petition to Intervene at 4-5 (Oct. 5, 1998) (Docket Item No. 1260); Sixteenth Memorandum at 28-31 (Docket Item No. 1347).

would act in the interests of the settlement agreement, but now Nebraska appears to see a tension between the 1978 Settlement Agreement and the equitable apportionment.[35] In any event, Basin's water rights are administered under Wyoming law, not Nebraska law, and it would be unusual, to say the least, for one state to act as *parens patriae* over another state's citizen.

The United States has not taken an active role in protecting Basin's interests at any time in this proceeding. Basin articulated this:

> If any party was in a position truly to represent the interests of Basin, it was the United States. The Attorney General's proxy executed the settlement agreement on behalf of the Federal parties. When these proceedings were instituted, had the United States not suffered what Ed Weinberg styled an attack of total amnesia, it might have appropriately filled the office of *parens patriae* for Basin. The interests of the United States—which has guaranteed loans of approximately half a billion dollars in relation to the Missouri Basin Power Project—and the interests of Basin in sustaining the settlement agreement and securing the project's rights in the waters of the Laramie are closely aligned. But the United States was slow out of the gate to understand this and never caught up.[36]

Wyoming cannot take on the role of *parens patriae* for Basin because it was not involved in the 1978 Set-

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[35] *See* Basin's Memorandum at 8 (Docket Item No. 1232); Basin's Reply at 3-4 (Docket Item No. 1256).

[36] Basin's Reply at 5 (Docket Item No. 1256).

tlement Agreement and might yet have to weigh and balance competing Wyoming interests. The United States argues that "Wyoming now better represents Basin Electric's interests than it did in 1988"[37] and that Basin "should continue to be the 'roving child of various parens patriae.'"[38] But, Wyoming's standing or right to protect Basin's interests in the 1978 Settlement Agreement, to which Wyoming is not a party, is at least vulnerable to challenge. In addition, if language is to be written into the decree at the conclusion of this proceeding to protect Basin's and Nebraska's rights to deliveries to the mouth of the Laramie River, it will likely take the form of an injunction against Wyoming. Wyoming can hardly be put in the position of presenting evidence to support an injunction against itself.

Following the Court's 1993 opinion, opening the lower Laramie to a potential equitable apportionment, and the Court's 1995 opinion allowing pleadings to that effect, the need for Basin to speak for its own interests has become apparent. These developments have served to distinguish Basin's interests from those of the City of Philadelphia in *New Jersey v. New York*.[39] Basin has a "direct stake" in the Laramie River issues,[40] and Basin's evidence and participation are central to resolving these issues. I find that no party can fully represent Basin as *parens patriae* and that, as this litigation has evolved, Basin's

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[37] United States' Brief in Opposition to Basin Electric Power Cooperative's Petition to Intervene at 4 (Sept. 18, 1998) (Docket Item No. 1247).

[38] *Id.*

[39] *See* discussion *supra* p. 7 & note 20.

[40] *See Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981); see discussion *supra* pp. 4-6 for a summary of Basin's interests.

status has become *sui generis* in the history of parties attempting to intervene in original jurisdiction cases. In addition, the policy considerations that limit private-party participation in original proceedings do not come into play in a situation like this where Basin enters the case for a limited purpose and has no appropriate *parens patriae*. As Basin has noted, no party "has suggested that permitting Basin to intervene for the limited purpose requested . . . would cause any problems or be injurious to the interests of any party."[1]

C. CONCLUSION

For all of the above reasons, my order of March 26, 1995, admitted Basin as a party in these proceedings to represent its interests in the Laramie River.

/s/ Owen Olpin/ by SBC
Owen Olpin
Special Master

Dated: April 2, 1999
k:\sbc\o&m\17th Memo (3-99)

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[1] Basin's Reply at 1 (Docket Item No. 1256).

No. 138. ORIGINAL

In the

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Exceptions to the First Interim Report of the Special Master

BRIEF OF THE STATE OF NORTH CAROLINA IN OPPOSITION TO PLAINTIFF'S EXCEPTIONS

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March 9, 2009

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QUESTION PRESENTED

Whether the Special Master correctly concluded that the advantages of allowing the motions to intervene outweighed any potential disadvantage and that the limited participation of these intervenors is consistent with this Court's precedent.

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STATEMENT

1. Under North Carolina law, any transfer of water from one river basin to another in excess of two million gallons per day must first be approved by the North Carolina Environmental Management Commission ("NC EMC"). N.C. Gen. Stat. § 143-215.22L (2009). On December 19, 2006, the South Carolina Attorney General wrote to the North Carolina Attorney General threatening to bring an original action in the event that the NC EMC were to approve a specific interbasin transfer ("IBT") relating to the Catawba River that was pending before the NC EMC. S.C. Br. in Support of Motion for Leave to File Bill of Compl., Ex. 2. After reviewing the impacts of the proposed IBT, as well as South Carolina's comments and concerns, the NC EMC reduced the size of the proposed IBT to a small fraction of the original request. With this substantial reduction, the IBT permit was approved by the NC EMC in January 2007. Despite the NC EMC's efforts to respond to South Carolina's concerns, South Carolina proceeded to file its Motion for Leave to File a Bill of Complaint.

As foreshadowed by the demand letter of the South Carolina Attorney General, South Carolina's Bill of Complaint in this action is focused on IBTs from the Catawba River. In its Bill of Complaint, South Carolina alleges:

> 3. In 1991, North Carolina enacted an "interbasin transfer statute" that purports to authorize the transfer of large volumes of water

> from one river basin in North Carolina to another basin in that State. Under that statute, North Carolina has authorized the transfer of at least 48 million gallons per day from the Catawba River Basin, with the most recent such transfer authorized in January 2007.
>
> 4. These past transfers – and threatened pending transfers – exceed North Carolina's equitable share of the Catawba River. . . .

Bill of Compl. ¶¶ 3, 4; *see also* S.C. Br. in Supp. of Mot. for Leave to File Bill of Compl., p. 9 ("The North Carolina interbasin statute, and the transfers from the Catawba River authorized under that statute, are directly contrary to this Court's decisions with respect to interstate rivers."). The Bill of Complaint expressly singles out three IBT authorizations held by: 1) the City of Charlotte, 2) the Cities of Concord and Kannapolis jointly, and 3) Union County (acting through the Catawba River Water Supply Project ("CRWSP") and pursuant to the statute's grandfather provision). Bill of Compl. ¶¶ 20, 21. Other than the permits held by Charlotte and Concord/Kannapolis, the NC EMC has issued no IBT permits with respect to the Catawba River.

In its prayer for relief, South Carolina requests that North Carolina be enjoined from authorizing the existing IBTs and issuing any future IBT permits. Bill of Compl., Prayer for Relief. South

Carolina made a comparable request in an Application for Preliminary Injunction.

2. Shortly after this Court granted South Carolina leave to file a Bill of Complaint, Duke Energy Carolinas, LLC ("Duke Energy"), CRWSP and the City of Charlotte filed motions for leave to intervene as defendants. This Court referred those motions to the Special Master.

Each of the three intervenors has a substantial and unique interest in this action. Duke Energy owns and operates a series of 11 dams and reservoirs along the Catawba/Wateree River – six in North Carolina, one at the North Carolina/South Carolina border, and four in South Carolina. These reservoirs allow Duke Energy to generate hydroelectric power and supply cooling water for its two nuclear power plants and three coal-fired plants in the Catawba River Basin. Lake Wylie, formed by the seventh dam along the Catawba River, is located on the border between North Carolina and South Carolina. The flow of water from the Catawba River into South Carolina is therefore controlled by Duke Energy.

Duke Energy is currently in the process of seeking a new license for its 11 dams and reservoirs ("Catawba-Wateree Hydro Project"). As part of its relicensing process before the Federal Energy Regulatory Commission ("FERC"), Duke Energy sought to include all stakeholders in an effort to build a consensus concerning the terms of a new license for these dams. The discussions and negotiations between Duke Energy and the stakeholders ultimately led to a Comprehensive

Relicensing Agreement ("CRA") that was signed by Duke Energy and 69 stakeholders in the Summer of 2006 and amended in December 2006. The signatories to the CRA include natural resources agencies of both South Carolina and North Carolina. That agreement sets out minimum rates of water flow into South Carolina from the Duke Energy reservoirs and, among other things, mandates specific conservation measures for all water users during drought conditions. The CRA constitutes a request by its signatories that FERC grant Duke Energy a license, subject to the terms and conditions of the CRA, for the Catawba-Wateree Hydro Project.

CRWSP is a joint venture consisting of a political subdivision of South Carolina (Lancaster County Water and Sewer District) and a political subdivision of North Carolina (Union County). Under North Carolina's IBT statute, Union County has authority to take five million gallons per day from the Catawba River. In the absence of this IBT, CRWSP could not completely serve its customers in both States. As a result, if this Court were to issue an injunction and equitable apportionment decree prohibiting the Union County IBT, the central purpose for the joint venture would fail.

The City of Charlotte transfers more water from the Catawba River than all other North Carolina transfers combined. Moreover, after Duke Energy, it is the largest consumer of water from the Catawba River in either North Carolina or South Carolina. The City of Charlotte is dependent on this IBT to serve the water needs of the City – water that is consumed by both North Carolina residents and the

thousands of South Carolina residents who commute each day to work in the Charlotte area.

3. After this Court's referral of the motions to intervene to the Special Master, the Special Master conducted a hearing in Richmond, Virginia. South Carolina opposed the motions to intervene. North Carolina consented to the motions of Duke Energy and CRWSP. North Carolina took no position with respect to the motion of the City of Charlotte. As North Carolina explained in filings with the Special Master, North Carolina was not in a position to consent to Charlotte's motion to the extent that the motion asserts that North Carolina will not adequately defend Charlotte's IBT permit.

The Special Master concluded that Duke Energy, CRWSP and the City of Charlotte each have a direct and compelling interest in this action and that their presence would facilitate the prompt resolution of this dispute. She accordingly issued an order recommending that they be allowed to intervene, on a limited basis, as defendants. Thereafter, South Carolina moved the Special Master for reconsideration. The Special Master denied South Carolina's motion for reconsideration.

SUMMARY OF ARGUMENT

South Carolina asserts that in an equitable apportionment action only the United States, Indian tribes or other States should be permitted to intervene. This argument is inconsistent with this Court's express recognition that flexibility is the linchpin of equitable apportionment actions.

Additionally, South Carolina's view cannot be squared with this Court's observation that it "is not unusual to permit intervention of private parties in original actions." *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). In determining whether intervention is appropriate in an original action, this Court and its Special Masters should be guided by the practical needs and limitations of the specific case at hand – not inflexible rules as advocated by South Carolina. Here, the Special Master carefully weighed the interests of both party States, the interests of the intervenors, and the practical advantages and disadvantages of their participation in assessing whether the intervenors' presence would assist her in reaching the proper outcome in this case.

South Carolina further asserts that the Special Master's recommendation, if adopted by this Court, would result in widespread intervention in this and other original actions. South Carolina's fear is unfounded. Only four entities are singled out in South Carolina's Bill of Complaint – three of whom have moved to intervene. The Special Master's recommendation is consistent with this Court's precedent and is highly fact-specific. Accordingly, the recommendation, if adopted by this Court, would not provoke a stampede of intervenors in this or other original actions.

The United States asserts that allowing the motions to intervene would impede the possibility of settlement between the party States. Prior to its filing of an amicus brief on February 20, 2009, the United States has had no involvement in this

proceeding. In contrast, the Special Master has conducted numerous hearings and conferences involving the party States and intervenors. Accordingly, she is in a much better position to judge whether the presence of the intervenors would facilitate or hinder settlement negotiations. Moreover, the United States fails to recognize that the traditional method for settling original actions (i.e., entry into a compact) requires approval by the state legislatures, as well as Congress. Excluding the intervenors from the settlement process would hinder, not facilitate, the ability of the party States to obtain legislative enactment of a compact.

The Special Master appropriately concluded that each of the three intervenors has a direct, compelling and concrete interest in participating, in a limited role, in this action. The interests of all three are attacked by South Carolina in the Bill of Complaint. Duke Energy controls the flow of the Catawba River as a result of its operation of the numerous dams and reservoirs along the river. Its motion to intervene is therefore particularly compelling. Similarly, both Charlotte and CRWSP stand as "the authorized agent[s] for the execution of the sovereign policy which threatened injury" to South Carolina. *New Jersey v. New York*, 345 U.S. 369, 375 (1953). Accordingly, the Special Master's recommendation stands solidly on the precedents of this Court.

Finally, the Special Master correctly concluded that neither party State would suffer any prejudice if these parties are allowed to intervene. In fact, South Carolina does not even make a cursory attempt to assert prejudice.

The Special Master engaged in the appropriate weighing of interests in determining whether the presence of these three intervenors would facilitate the prompt resolution of this action. North Carolina respects and supports the Special Master's carefully considered recommendations.

ARGUMENT

PLAINTIFF'S EXCEPTIONS TO THE FIRST INTERIM REPORT SHOULD BE DENIED

Both South Carolina and the United States paint the decision of the Special Master as opening the floodgates of intervention in all equitable apportionment actions. It will not. Rather, her determination stands as a realistic and practical observation, based on the unique circumstances of this specific case, that granting the intervenors a limited role in this action will facilitate the proper resolution of this dispute. The Special Master's recommendation is entirely consistent with this Court's precedent.

I. THE COURT SHOULD REJECT SOUTH CAROLINA'S INVITATION TO ADOPT A BLANKET RULE THAT ONLY THE UNITED STATES, INDIAN TRIBES AND STATES MAY INTERVENE IN WATER RIGHTS CASES.

While chastising the Special Master for adopting a "one-size-fits-all" rule, South Carolina and the United States advocate a blanket rule that would allow only the United States, Indian tribes

and States to intervene in water rights cases. *See* S.C. Br., p. 21 (arguing that the Court should not permit "non-sovereign water users in an action to apportion equitably an interstate river between States"); U.S. Br., p. 7 ("The Special Master sought to formulate a one-size-fits-all rule to govern non-state parties' participation in original actions in this Court . . . ."). The blanket rule proposed by South Carolina should be rejected by this Court.

Each original action is unique. As reflected by this Court's precedent, the unique factors of each case can and should be considered in determining whether intervention is appropriate. *See, e.g., Arizona v. California*, 460 U.S. 605, 613-15 (1983) (permitting Indian tribe to intervene in original action involving water rights); *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) ("[I]t is not unusual to permit intervention of private parties in original actions."); *see also Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930) ("An individual citizen may be made a party where relief is properly sought as against him, and in such case he should have suitable opportunity to show the nature of his interest and why the relief asked against him individually should not be granted.").

When the Court exercises its original jurisdiction in a dispute involving water rights, the Court must "resolve[] interstate claims according to the equities." *Arizona v. California*, 373 U.S. 546, 562 (1963). This delicate balancing of interests does not lend itself to inflexible rules that may hinder the weighing of the many factors necessary to ensure a fair and equitable allocation. *See Idaho ex rel. Evans*

v. Oregon, 462 U.S. 1017, 1026 n.10 (1983) ("Flexibility is the linchpin in equitable apportionment cases . . . ."). Nevertheless, South Carolina proposes an inflexible rule that would preclude a Special Master from hearing from intervenors whose presence would aid the weighing of those equities.

The rule advocated by South Carolina cannot be reconciled with this Court's express holding that local governments may participate in an original action when named as a defendant.[1] In *New Jersey v. New York*, 345 U.S. 369, 375 (1953), this Court expressly recognized that the City of New York could participate as a defendant in an equitable apportionment action brought pursuant to this Court's original jurisdiction when that city stands as "the authorized agent for the execution of the sovereign policy which threatened injury" to the complaining State.

South Carolina asserts that this Court's decision in *New Jersey v. New York* is distinguishable because the City of New York was named as a defendant against its will, and a plaintiff should be the master of his own complaint. S.C. Br., p. 31. South Carolina correctly notes that in actions filed in federal district court, a plaintiff is generally

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[1] The analysis of the intervention motions, of course, would be completely different if the intervenors were seeking to assert claims for relief as a plaintiff. *See* S.C. Br., p. 18 n.11. Here, the intervenors are not asserting any affirmative claim for relief.

master of his own complaint. 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 107.14(2)(c)(v), at 107-67 (3d ed. 2006) (under federal rules of civil procedure, "the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue"); *see Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005) (citing general rule in context of action filed in district court and governed by federal rules of civil procedure). In an original action, however, this general rule must give way to the Court's traditional "gatekeeping function" and the Court's desire to closely manage its original docket. *See Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995).

Under South Carolina's reading of *New Jersey v. New York*, the City of Charlotte could be made a defendant if it had been included in the caption of South Carolina's Bill of Complaint, but because Charlotte was not so named, it may not be joined as an intervenor. That position defies logic. This Court, rather than South Carolina, must determine who should stand as defendants in this action, irrespective of whether South Carolina has carefully crafted its Bill of Complaint in an effort to avoid naming as defendants the instrumentalities of its purported harm.

If South Carolina were correct that this Court's precedents create a blanket rule against intervention in water rights cases, there would have been no need for the Court to refer the intervention motions to the Special Master. In addition to the briefing before this Court, the States and intervenors have submitted numerous briefs and

have engaged in several oral arguments before the Special Master with respect to the motions at issue. Under South Carolina's theory, that effort was completely unnecessary because the Special Master should have summarily denied those motions. The Court's decision to refer this issue to the Special Master, however, reflects that the resolution of the motions requires a careful balancing analysis and is not governed by an inflexible rule that would automatically preclude intervention. If such balancing of interests were not necessary, the Court could have issued a one sentence order disposing of the motions and saving the Special Master, the States and the intervenors unnecessary expenditures, time and effort.

The blanket rule that South Carolina advocates would also undermine the very role that Special Masters play in original actions. The Special Master is in the best position to determine whether the presence of intervenors will benefit the resolution of the case and the extent to which the intervenors' involvement should be limited. Having engaged in numerous hearings and status conferences in which the intervenors participated, the Special Master understands fully the dynamics of this dispute and whether the presence of the intervenors would assist in its prompt resolution. The motions to intervene are first and foremost a case management issue – a determination that the Special Master is in the best position to make given her unique perspective. Here, the Special Master believes the presence of the intervenors to be an asset, rather than a detriment. This Court should accept the considered and well-

reasoned recommendation of the Special Master as to how to best move this case forward.

II. SOUTH CAROLINA'S CONCERN OVER THE POSSIBILITY OF WIDE-SCALE INTERVENTION IS MISPLACED.

South Carolina asserts that the Special Master's recommendation, if adopted by this Court, would result in wide-scale intervention in other original actions. S.C. Br., p.15 (arguing that the Special Master has "open[ed] the door to widespread intervention in original actions generally"); *see also* U.S. Br., p. 21 (Special Master's recommendation "raises the specter of wide-scale intervention by individual water users"). Such a concern is unfounded.

The Special Master concluded that each of the three intervenors has a direct, compelling and concrete interest in the present dispute. Interim Report, pp. 25, 27-28, 32. The Special Master correctly observed that the number of similarly situated parties is extremely small. *See id.* at 25. In fact, there are a total of four – only three of whom have moved to intervene. The Bill of Complaint focuses on three interbasin transfers (the City of Charlotte, Concord/Kannapolis and CRWSP/Union County) and the utility that controls the flow of the Catawba River through the operation of its federally permitted system of dams and reservoirs. The Special Master recognized that the presence of Duke Energy, Charlotte and CRWSP would not make the litigation unmanageable nor would the granting of the motions result in widespread requests by others.

Only one other interbasin transfer (Concord/Kannapolis) is mentioned in the Bill of Complaint.[2]

The granting of the present motions would not result in a rash of intervention motions in other cases. The Special Master's lengthy report focuses on the unique facts of each intervenor and the nature of South Carolina's specific challenge to each intervenor's rights and interests. As the Special Master recognized, Charlotte and CRWSP have been specifically attacked by South Carolina as the "agent or instrumentality of the harm" of which South Carolina complains. Interim Report, p. 15. South Carolina's Bill of Complaint explicitly seeks relief against both. *See id.* at 22-23, 27-28. The Special Master also recognized that Duke Energy has unique rights and interests in this action as a result of its control of the dams on this river system. *Id.* at 28-29.

As set forth above, the Special Master properly considered the unique circumstances of the dispute and the practicalities of managing the litigation before her. Given the fact-specific nature of her recommendation, there is simply no risk that by

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[2] Given the passage of almost two years since South Carolina moved to file a Bill of Complaint, any motion by Concord/Kannapolis at this late stage undoubtedly would be denied. The few additional North Carolina municipalities with "grandfathered" IBTs that, arguably, could have sought to intervene would likewise be precluded from doing so at this late date.

adopting that recommendation, this Court will spawn a plethora of intervention motions in other cases.

III. THE UNITED STATES ERRS IN ASSERTING THAT THE PRESENCE OF INTERVENORS WOULD MAKE SETTLEMENT MORE DIFFICULT.

In its amicus brief, the United States argues that the motion to intervene should be denied because the presence of the intervenors will make settlement more difficult.[3] U.S. Br., pp. 8, 21-22. Specifically, the United States asserts that any expansion of the number of parties would make it less likely that the case could be settled. *Id.* at 21. That argument, however, fails to consider fully the process by which States traditionally have settled water right disputes.

Should North Carolina and South Carolina successfully negotiate a settlement of the present dispute, such a resolution would likely need to be memorialized through a compact between the States. *See* S.C. Mot. for Leave to File Bill of Complaint, Ex. 2, at 8 (Letter of Dec. 19, 2006 from General

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[3] Other than its filing of an amicus brief, the United States has had no involvement in this proceeding. Accordingly, this Court should defer to the Special Master's assessment as to whether the presence of the intervenors would make settlement more difficult, rather than the assessment of the Acting Solicitor General.

McMaster to General Cooper) (noting that the "alternative to litigation" is to "negotiate an interstate compact"). An interstate compact, of course, requires that the terms of the compact be ratified by the legislatures of the party States. Additionally, the compact must be approved by Congress. U.S. CONST. ART. I, § 10, cl. 3 ("No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."); *see also College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) ("Under the Compact Clause, U.S. Const., Art. I, § 10, cl. 3, States cannot form an interstate compact without first obtaining the express consent of Congress . . . ."); *Colorado v. Kansas*, 320 U.S. 383, 392 (1943) (recognizing that settlements of equitable apportionment actions should be "pursuant to the compact clause of the federal Constitution"). Because a compact must be enacted by the state legislatures and Congress, all interested persons can petition their elected representatives with respect to any proposed settlement of the present dispute.

The brief of the United States leaves the incorrect impression that two States can reach a settlement agreement in confidence without having to consider the views of interested parties. That, however, is simply not the case. In fact, if interested parties are excluded from the process (as the United States advocates), they are more likely to derail any tentative agreement when that agreement must be voted on by the state legislatures and members of Congress.

The United States also fails to recognize that the involvement of the three specific intervenors (whose motions the United States opposes) is crucial in working toward any realistic settlement of this action. The amount of water released from the dams owned and operated by Duke Energy controls the flow of the river into South Carolina. In light of the role of Duke Energy in managing (and understanding) the flow of this river for over one hundred years, any attempt to exclude Duke Energy totally from the negotiation process would be extremely short-sighted. In fact, Duke Energy was the principal facilitator for bringing South Carolina, North Carolina and other interested parties together to negotiate and execute a Comprehensive Relicensing Agreement in connection with Duke Energy's new FERC license application for the Catawba-Wateree Hydro Project. Those negotiations, which appeared successful until the filing of this action by South Carolina, produced a negotiated settlement with respect to the rate of water flow into South Carolina from the Duke Energy reservoirs, as well as an agreement as to specific conservation measures that all water users are required to undertake during drought conditions.

Similarly, excluding the City of Charlotte and CRWSP from any negotiation efforts would likely doom those efforts to failure. In this action, South Carolina seeks to enjoin the interbasin transfers of both of those entities. Settlement is much more likely if the parties that are the focus of South Carolina's claims are included in settlement discussions. Moreover, if Charlotte and CRWSP were completely excluded from settlement

discussions, both States would likely have great difficulty in obtaining the necessary legislative support for a compact.

The Special Master wisely recognized that allowing these three intervenors to participate in this action, in a limited role, would aid in the resolution of this dispute, irrespective of whether this dispute is ultimately resolved by a decree from this Court or through a negotiated settlement.

IV. EACH OF THE THREE INTERVENORS HAS SUFFICIENT INTEREST TO JUSTIFY ITS PARTICIPATION IN THIS ACTION.

Each of the three intervenors has a compelling justification for being heard in this action. The Special Master properly considered the interests of the intervenors, the impact their presence might have on the party States and whether their presence would add to her ability to obtain and assimilate the information necessary for her to properly understand this unique water system. Prior to the rulings that South Carolina now challenges, the Special Master had the benefit of nine status conferences and one formal hearing (spanning a total of 668 transcript pages) in which the intervenors participated. Thus, the Special Master clearly understood the advantages and disadvantages of allowing the intervenors to participate and how their presence would affect the litigation. She concluded that the participation of these entities, in a limited role, would assist her in reaching the proper outcome in this case and that any potential downside to their

participation could be controlled and minimized. North Carolina respects and supports the Special Master's conclusion.

1. Duke Energy's request to intervene is well taken. Duke Energy built and has owned and operated the dam system that controls this river for over a hundred years. These dams are licensed by FERC. As the Special Master noted, "[b]oth Duke's existing . . . license and the agreed-to terms for its prospective FERC license set minimum flow requirements under various conditions, including times of drought." Interim Report, p. 29. But for the presence of these dams, the natural flow of the river would fluctuate so greatly that it would be quite difficult to have sustainable development in the Catawba River Basin in either State. Moreover, Duke Energy is the largest consumer of water from the Catawba River – water that is used to produce electricity for the benefit of residents of both States.

Despite Duke Energy's substantial interests in the Catawba River, South Carolina asserts that Duke Energy stands in the same class as all other persons who consume water from this river – a class of persons that is adequately represented by North Carolina as *parens patriae*. North Carolina vehemently disputes this contention and does not purport to represent the interests of Duke Energy in this litigation.

The relief that South Carolina requests, in addition to striking down North Carolina's IBT statute and the existing IBTs, is an allocation of a specific flow of water into the State of South

Carolina (which South Carolina apparently believes to be 711 million gallons per day). Bill of Compl. ¶ 14. When natural conditions do not support a flow at this level, sustaining such a flow into South Carolina could be achieved by either: 1) drawing down water from the reservoirs owned and operated by Duke Energy; 2) reducing North Carolina's intake from the river, or 3) some combination of both. Duke Energy's financial interests in preserving the stored energy capacity behind each of its dams stand in sharp contrast to North Carolina's interests in this action.

As the Special Master recognized, Duke Energy also has a compelling interest in ensuring that the Comprehensive Relicensing Agreement is not undermined by this litigation. In that agreement, Duke Energy, South Carolina, North Carolina, numerous local governments in both States, and various private entities agreed on flow parameters for the river, as well as conservation measures in times of drought. South Carolina's filing and prosecution of this action threatens to undermine the core environmental provisions of the agreement. Under these unique circumstances, Duke Energy should be permitted an opportunity to be heard.

Through its dams, Duke Energy controls the flow of this river and has a vital stake in maintaining its reservoirs in both States. That interest is not aligned with either South Carolina or North Carolina. Accordingly, Duke Energy should be permitted to intervene.

2. The interests of CRWSP have been expressly attacked by South Carolina in the Bill of Complaint. In this action, South Carolina seeks to enjoin CRWSP's current IBT. Accordingly, CRWSP has a substantial interest in being heard in this action.

CRWSP stands in an extremely difficult position as a result of this litigation. CRWSP is a joint venture consisting of a political subdivision of South Carolina (Lancaster County Water and Sewer District) and a political subdivision of North Carolina (Union County). If South Carolina were to succeed in enjoining the IBT on which CRWSP relies to serve its customers in Union County, the joint venture would undoubtedly unravel, thereby creating great hardship for residents in both States. Although North Carolina opposes South Carolina's request that all IBTs in North Carolina be enjoined, the State of North Carolina does not and cannot represent the financial interests of a political subdivision of the State of South Carolina. Thus, the interests of CRWSP are not and cannot adequately be represented by either State. CRWSP's motion to intervene should therefore be allowed.

3. Charlotte's IBT dwarfs all other transfers of water in North Carolina from the Catawba River. This IBT is specifically attacked in the Bill of Complaint, and South Carolina requests that North Carolina be enjoined from allowing Charlotte to continue its transfers of water from the Catawba River. Thus, South Carolina's Bill of Complaint effectively paints a bulls-eye on the City of Charlotte. As a result, Charlotte has a substantial

and compelling interest in requesting leave to intervene.

Before the Special Master, Charlotte asserted that its interest were not adequately represented by the State of North Carolina. The State of North Carolina disagrees with this assertion by Charlotte. Nevertheless, North Carolina does not believe that this factor is, or should be, determinative here. Charlotte transfers more water from the Catawba River than all other North Carolina transfers from the Catawba combined. Moreover, after Duke Energy, it is the largest consumer of water from the Catawba River in either North Carolina or South Carolina. As a result, its role with respect to this river is unique and has caused it to be singled out by South Carolina. Charlotte's involvement in this dispute is precisely analogous to the role of the City of New York in *New Jersey v. New York*, 345 U.S. 369 (1953). As in *New Jersey v. New York*, Charlotte is "the authorized agent for the execution of the sovereign policy which threatened injury" to the complaining State. *Id.* at 375. Just as the City of New York was permitted to participate as a defendant in that original action, Charlotte should be permitted to participate as a defendant here. The fact that South Carolina chose not to name Charlotte as a defendant should not be controlling.

In *New Jersey v. New York*, the Court denied the motion to intervene filed by the City of Philadelphia – a motion that was filed over two decades after the original action had been commenced. This Court recognized that the presence of Philadelphia at such a late stage would

add little given the fact that the State of Pennsylvania had been represented throughout the proceeding. In doing so, the Court noted that under the doctrine of *parens patriae*, a State is deemed to represent its citizens for otherwise "a state might be judicially impeached on matters of policy by its own subjects." 345 U.S. at 373. This statement, however, must be read in the context of the procedural posture of that case. South Carolina is mistaken in reading this sentence to mean that when a State is made a party to an original action, its subjects cannot also be made parties. If this were the case, the Court would not have allowed the City of New York to participate as a defendant given the presence of the State of New York in that action. Here, Charlotte's unique status makes it more comparable to New York than to Philadelphia. This is particularly true given that North Carolina is not concerned that it will be judicially impeached by Charlotte's positions in this action.[4]

In light of South Carolina's specific attack on Charlotte in the Bill of Complaint, North Carolina agrees with the Special Master's recommendation that Charlotte be allowed to intervene.

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[4] In *New Jersey v. New York*, the State of Pennsylvania opposed intervention by the City of Philadelphia. 345 U.S. at 372. Here, North Carolina concurs with the Special Master's recommendation to allow Charlotte to intervene.

V. THE PRESENCE OF THE INTERVENORS WILL NOT PREJUDICE THE PARTIES.

The Special Master concluded that the presence of the intervenors will not prejudice either North Carolina or South Carolina. *See, e.g.*, Interim Report, p. 42. In South Carolina's lengthy brief in support of her exceptions, South Carolina fails to point to a single, concrete example of prejudice that will be suffered by either State.

The Special Master has taken an active, hands-on approach to managing this original action. She has instituted a practice of conducting detailed monthly telephonic conferences to ensure that the case is progressing. Those conferences frequently address the specifics of all pending discovery. Additionally, the parties have been directed to submit written status reports to the Special Master on a monthly basis. Given the tremendous efficiencies that the Special Master has imposed to date in this action, North Carolina is confident that the Special Master will not allow the presence of the intervenors to negatively impact the progress or costs of this proceeding.

CONCLUSION

The plaintiff's exceptions to the Special Master's First Interim Report should be denied.

Respectfully submitted,

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March 9, 2009

*Counsel of Record

No. 138, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

APPLICATION OF THE STATE OF SOUTH CAROLINA FOR LEAVE TO FILE SUR-REPLY IN SUPPORT OF EXCEPTIONS TO FIRST INTERIM REPORT OF THE SPECIAL MASTER IN EXCESS OF WORD LIMITATION

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Pursuant to Rules 22 and 33.1(d) of the Rules of this Court, plaintiff the State of South Carolina respectfully moves for leave to file a sur-reply of 9,000 words, rather than 7,500 words. This modest increase is necessary and supported by good cause, so that South Carolina may respond adequately to three lengthy briefs filed by proposed intervenors, as well as a fourth brief in their support filed by defendant the State of North Carolina.

On January 9, 2009, this Court ordered received and filed the First Interim Report of the Special Master, which recommends that three proposed intervenors (the City of Charlotte, North Carolina, the Catawba River Water Supply Project, and Duke Energy Carolinas, LLC) be admitted as parties to this equitable

apportionment action. In the same order, the Court granted South Carolina's motion for leave to file exceptions to that Report and provided for a brief on exceptions, replies thereto, and a sur-reply.

On February 9, 2009, South Carolina filed its brief on exceptions totaling 14,823 words. On February 23, 2009, the United States filed an *amicus* brief supporting South Carolina totaling 5,866 words. On March 9, 2009, the three proposed intervenors each filed separate briefs totaling 30,017 words. North Carolina filed a brief totaling 5,666 words supporting their interventions, for a total of 35,683 words.

South Carolina's sur-reply is due by 2:00 p.m. on March 23, 2009. Although Supreme Court Rule 33.1 does not specifically address word limits for sur-replies on exceptions in original actions, we understand that South Carolina's sur-reply is limited to 7,500 words, which is the analogous word limit for reply briefs on the merits. *See* Sup. Ct. R. 33.1(g)(vii).

The 1,500-word increase requested by South Carolina, to 9,000 words from 7,500 words, is modest and justified by good cause. The total number of words in the three proposed intervenors' briefs is double the 15,000 words ordinarily permitted by Supreme Court Rule 33.1 for a single brief from a respondent on the merits or in reply to exceptions in an original action. *See* Sup. Ct. R. 33.1(g)(vi), (viii). The addition of North Carolina's brief further increases that disparity. Each of the three proposed intervenors' briefs to which South Carolina must respond takes different positions and reflects different interests. Allowing this slight

expansion of South Carolina's sur-reply will assist the Court, by permitting South Carolina to brief certain matters that might otherwise be raised only in questions at oral argument, should one be scheduled

Accordingly, plaintiff the State of South Carolina respectfully moves for leave to file a sur-reply in support of its exceptions to the First Interim Report of the Special Master in excess of the 7,500 word limitation, but not exceeding 9,000 words.

Respectfully submitted,

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March 17, 2009

No. 138, Original

In the
Supreme Court of the United States

State of South Carolina,

Plaintiff,

v.

State of North Carolina,

Defendant.

Duke Energy Carolinas LLC,
Catawba River Water Supply Project, and
City of Charlotte, N.C.,

Intervenors.

MOTION FOR DIVIDED ARGUMENT
OF DEFENDANT AND INTERVENORS

I. Introduction

Pursuant to this Court's Rules 21 and 28.4, defendant State of North Carolina and intervenors Duke Energy Carolinas, LLC ("Duke"), Catawba River Water Supply Project ("CRWSP") and City of Charlotte, N.C. ("Charlotte") (collectively, "Intervenors") respectfully move for an order granting Intervenors leave to participate in oral argument on Plaintiff's exceptions, if the case is set for oral argument, and to divide

their time for oral argument as follows: ten minutes for Duke, ten minutes for CRWSP and ten minutes for Charlotte. Granting this motion would not require the Court to enlarge the overall time for oral argument on South Carolina's exceptions. Neither North Carolina nor Intervenors have opposed the United States' motion to participate in divided argument in support of South Carolina.

Division of argument time is proper because each intervenor has (a) different interests justifying its intervention and (b) a unique response to South Carolina's contention that Intervenors are adequately represented by the States. Divided argument is appropriate where all parties have substantial interests in the intervention question, *see New Jersey v. New York*, 345 U.S. 369 (1953) (dividing intervention argument five ways), and where, as here, parties have "factually distinct positions." Eugene Gressman et al., Supreme Court Practice 760 (9th ed. 2007) (citing the Court's division of argument time in *Rapanos v. United States*, 126 S. Ct. 617 (2005) and *Clinton v. City of New York*, 523 U.S. 1058 (1998)).

North Carolina — which has endorsed the Special Master's recommendation that the Court grant the three intervention motions as set forth in her First Interim Report — supports Intervenors' proposed division of oral argument time. North Carolina also requests the opportunity to be heard in connection with the motions to intervene. North Carolina, however, recognizes that allowing a four-way division of an oral argument would be extraordinary. Accordingly, if the Court is not inclined to grant a four-way division of oral argument time, North Carolina requests that the Court grant a three-way division of oral argument time between Duke, Charlotte and

CRWSP, with North Carolina standing on its brief. In the event that the Court chooses to limit oral argument to less than three counsel per side, North Carolina remains available to explain at oral argument why it believes that all three motions to intervene should be granted; but North Carolina supports each Intervenor's request to present arguments on its own behalf.

II. The Unique Circumstances of Each Intervenor

A. Charlotte, the largest municipality and water supplier on the Catawba River, is (in her view) the primary target of South Carolina's Complaint. The Complaint focuses on the inter-basin transfer (IBT) of water under the North Carolina IBT statute, and Charlotte is the only entity in North Carolina that is both (a) vested with certificated IBT authority under the statute and (b) actually transferring water from the North Carolina portion of the River. Charlotte's IBT authorization is by far the largest in North Carolina from the Catawba, and South Carolina seeks to enjoin that authority. South Carolina cannot achieve any meaningful reduction in public water use in North Carolina through apportionment without reducing Charlotte's IBTs and consumption.

Charlotte should be heard at oral argument because her motion to intervene uniquely tests the holding of *New Jersey v. New York*, 345 U.S. 369 (1953), in which this Court denied Philadelphia's motion to intervene on the ground that Philadelphia had no compelling interest that could not be adequately represented by Pennsylvania (which opposed the motion). South Carolina contends that Charlotte could be adequately represented here by North Carolina, a view with which North Carolina has

expressed agreement — although North Carolina *supports* Charlotte's motion and the Special Master's recommendation. North Carolina supports Charlotte's motion because, as the Special Master recognized, Charlotte's situation is analogous, not to Philadelphia's (whose motion her home state opposed), but to that of New York City, which was allowed to participate as a party defendant because she was the entity in New York State alleged to be the cause of injury to plaintiff New Jersey. Thus, Charlotte will argue that she should be allowed to intervene whether or not North Carolina might be said to adequately represent her.

The foreseeable interest of the Court in that legal question at oral argument is not undercut by the fact that Charlotte also argues in the alternative that North Carolina does not in fact adequately represent her interests. North Carolina has an undifferentiated responsibility as *parens patriae* for its citizens generally. Charlotte has a much narrower perspective: she only seeks to defend the specific interests of her residents and customers, which are exclusively downstream users. Charlotte's position in this alternative argument is as unique as her primary argument, given that she is located entirely within one of the party states. As a result, her position at oral argument will be distinct from the equally unique positions of both Duke and CRWSP.

B. Duke has eleven impoundments and thirteen hydroelectric facilities within the Catawba River which directly govern the flow and River uses that South Carolina seeks to alter through injunctive relief and equitable apportionment. In a very real sense, Duke is the steward that manages the River. Any injunction or equitable apportionment entered in this case will implicate Duke's vital interests.

Duke conducts its operations on the Catawba River pursuant to a FERC license which is presently the subject of renewal proceedings. As part of the renewal process, Duke brought Catawba River stakeholders together in the Comprehensive Relicensing Agreement (CRA), a contract among water providers and other users of the River which addresses, among other things, Duke's obligations with respect to flow into South Carolina during times of drought. Duke's operations under its current FERC license result in the impounded water that allows the River to flow, especially during drought periods.

Practically, Duke will also be asked to implement, monitor and enforce any remedy ordered in this case. Neither North Carolina nor South Carolina can or will adequately represent Duke's multi-fold interests in the Catawba River. Duke's intervention and South Carolina's opposition to it involve detailed contentions about the nature and extent of Duke's control of the River itself and its property rights, contractual and other relations with those who use or seek to use the River, and withdraw water therefrom – contentions not shared and thus not represented by either party State.

C. CRWSP withdraws water from the Catawba River in South Carolina and supplies it to residents of both North Carolina and South Carolina. CRWSP has a direct stake in this case because South Carolina's Complaint seeks to enjoin an interstate, interbasin transfer of water by CRWSP to Union County, North Carolina. South Carolina is purportedly seeking to eliminate or at least reduce significantly any transfer of water by CRWSP to North Carolina. CRWSP also has a direct stake in any

equitable apportionment decree that could affect flows of water at its intake and the right to withdraw water in South Carolina or deliver now and in the future affordable water to customers in both South and North Carolina.

It is vital for CRWSP to be permitted to address its unique facts which establish that, as a consequence of its unusual bi-state role, neither South Carolina nor North Carolina can represent CRWSP's interests. South Carolina obviously seeks an injunction and equitable apportionment against CRWSP. Similarly, North Carolina has an interest in ensuring that it can make withdrawals from the Catawba River to support the reasonable water needs of its citizens and residents, which according to the Complaint's allegations compete with water use in South Carolina. CRWSP, which serves roughly 100,000 South Carolina residents, therefore can turn to neither North Carolina nor South Carolina to protect its interests. The party States have essentially conceded this.

III. The Impediments to Common Counsel

Prior to filing this motion, Intervenors diligently explored the possibility of representation by common counsel on the intervention question. Although Intervenors have joint and common interests on the claims South Carolina has raised in this Court, they have concluded that their divergent factual circumstances result in potentially conflicting legal positions *with respect to intervention*, and therefore that no single counsel should represent all three of them. The Intervenors may need to compare and contrast their specific factual circumstances which has the potential to create adversity; and efforts to avoid adversity could materially limit the lawyer's ability to

advocate vigorously on behalf of individual intervenors. The best answer to any particular question posed by the Court about the legal standard or factual circumstances warranting intervention may well differ for each Intervenor. Thus, a single counsel's answer would best serve only one of his or her clients.

Further, no single Intervenor's counsel really knows and understands completely the factual circumstances of the other Intervenors as relevant to the legal standard for intervention. In a very short interlude, new counsel would have to master three wholly distinct sets of factual circumstances for three different clients. Moreover, in these times of diminishing tax and other revenues, local governments must be careful stewards of their resources; new joint counsel would be extremely costly.

The Court will be asked to make a *sui generis* decision with respect to each Intervenor (as the Special Master did). Separate participation by each Intervenor will provide the Court with the full understanding of each Intervenor's individual factual interests necessary to decide whether intervention is appropriate.

IV. Precedent for Three-Way Division of Oral Argument

The division of argument time proposed here is strongly supported by a significant ruling on the question of intervention – *New Jersey v. New York*. In that case, this Court divided oral argument on Philadelphia's motion to intervene five ways. The Court granted 20 minutes of argument time to Philadelphia and to each of the four existing parties (New Jersey, New York State, New York City, and Pennsylvania). *See* 344 U.S. 932 (1953) (order); *see also* 345 U.S. at 370 (listing the five attorneys who argued the cause).

The Court has also recognized that in an appropriate case, argument should be divided to permit intervenors to represent their interests in original actions. *See, e.g., Connecticut v. New Hampshire*, 507 U.S. 1016 (1993) (dividing argument and granting intervenors time to participate in oral argument); *South Carolina v. Baker*, 484 U.S. 892 (1987) (same). That is consistent with the Court's general practice of dividing arguments among private parties with inconsistent interests in the litigation.[1] While the foregoing authorities did not involve three parties seeking to present argument, those and other decisions, *see, e.g., Ohio v. Wyandotte Chemicals Corp.*, 400 U.S. 963 (1970) (granting motion to permit three attorneys to participate in oral argument on behalf of defendants in No. 41, Original), illustrate the Court's attention to the unusual circumstances, such as those presented here, that warrant a three-way division of oral argument. *See, e.g., Bush v. Vera*, 516 U.S. 911 (1995) (dividing appellants' oral argument time amongst three parties and extending oral argument by ten minutes for each side); *Pope v. Hunt*, 516 U.S. 962 (1995) (dividing appellees' oral argument time amongst three parties and extending oral argument by ten minutes for each side).

V. Conclusion

In light of the distinct, compelling and conflicting factual interests and legal positions of the three Intervenors, oral presentation of the views of each Intervenor is essential, will be of material assistance to the Court and is well-supported by the decisional law granting divided oral argument under these circumstances.

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1 *See, e.g., Travelers Indem. Co. v. Bailey*, -- S. Ct. --, 2009 WL 578684 (March 9, 2009); *Burlington N. and Santa Fe Ry. Co. v. United States*, 129 S. Ct. 970 (2009); *Pacific Bell Tel. Co. v. Linkline Comm., Inc.*, 129 S. Ct. 617 (2008); *Peake v. Sanders*, 129 S. Ct. 527 (2008); *Clinton v. City of New York*, 523 U.S. 1058

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March 23, 2009

No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Exceptions to
First Interim Report of the Special Master

SUR-REPLY BRIEF OF THE STATE OF SOUTH CAROLINA IN SUPPORT OF EXCEPTIONS TO FIRST INTERIM REPORT OF THE SPECIAL MASTER

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GLOSSARY

CMO No. 8	Case Management Order No. 8, *South Carolina v. North Carolina*, No. 138, Orig. (Sept. 24, 2008)
Compl.	Complaint, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed June 7, 2007)
CRA	Comprehensive Relicensing Agreement
CRWSP	Catawba River Water Supply Project
Draft EIS	Draft Environmental Impact Statement
Duke or Duke Energy	Duke Energy Carolinas, LLC
FERC	Federal Energy Regulatory Commission
IBT	interbasin transfer
LIP	Low Inflow Protocol
NC App.	Appendix to Brief of the State of North Carolina in Opposition, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Aug. 7, 2007)
NC Charlotte Resp.	Brief of the State of North Carolina in Response to the City of Charlotte's Motion for Leave To Intervene and File Answer, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Feb. 22, 2008)

No. 5 Phil. Mem.	Memorandum in Support of the Motion of the City of Philadelphia for Leave To Intervene and To File an Answer to the Petition of the City of New York for Modification of the Decree, *New Jersey v. New York*, No. 5, Orig. (Mar. 7, 1953)
No. 108 16th Mem.	Sixteenth Memorandum of Special Master on the United States' Motion To Dismiss and Motion for Summary Judgment, *Nebraska v. Wyoming*, No. 108, Orig. (Mar. 26, 1999)
No. 108 17th Mem.	Seventeenth Memorandum of Special Master on Petition To Intervene of Basin Electric Power Cooperative, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 2, 1999)
No. 108 Basin Mot.	Motion of Basin Electric Power Cooperative for Leave To Intervene and Memorandum in Support of Motion and Answer, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 13, 1987)
No. 108 First Report	First Interim Report, *Nebraska v. Wyoming*, No. 108, Orig. (June 14, 1989)
No. 108 Second Report	Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 9, 1992)

No. 108 Third Report	Third Interim Report on Motions To Amend the Pleadings, *Nebraska v. Wyoming*, No. 108, Orig. (Sept. 9, 1994)
No. 129 Mem. of Decision No. 1	Special Master's Memorandum of Decision No. 1 (Subject: *Amicus Curiae* Motions), *Virginia v. Maryland*, No. 129, Orig. (Dec. 11, 2000)
Report	First Interim Report of the Special Master, *South Carolina v. North Carolina*, No. 138, Orig. (Nov. 25, 2008)

INTRODUCTION

South Carolina seeks a decree equitably apportioning the Catawba River, so that South Carolina gets its fair share of the River's waters, irrespective of the particular uses that North Carolina authorizes from within its equitable share. Applying the test set forth in *New Jersey v. New York*, 345 U.S. 369 (1953) (per curiam), this Court has repeatedly prevented party States' citizens from intervening in such actions, which implicate uniquely sovereign interests. In such a dispute, each State has an obligation to represent the interests of all in-state water users as *parens patriae*.

Applying a different test, the Report recommends allowing three non-state entities to intervene. As proposed intervenors' briefs demonstrate, intervention would transform this equitable apportionment action between sovereign States into an intramural dispute over the interests of North Carolina water users. As precedent for such an extraordinary result, the putative intervenors can cite only the unreviewed decision of the Special Master in *Nebraska v. Wyoming*, No. 108, Orig. But they ignore that, by the time intervention was permitted more than a decade into that litigation, the relief Nebraska sought was no longer confined to each State's equitable share of an interstate river and the non-state entity was directly opposed to its home State, a situation "*sui generis* in the history of parties attempting to intervene in original jurisdiction cases."[1]

That situation is not presented here. Each proposed intervenor is adequately represented by one or both of the party States and can point to no interest

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[1] No. 108, 17th Mem. 12-13 (Duke Add. 13-14).

that is either compelling or unique from those of other citizens. Allowing any of these entities to intervene would open the floodgates to intervention in future cases, as they can offer no limiting principle that would exclude water users and dam and reservoir operators in future actions. South Carolina's exceptions therefore should be sustained and the motions to intervene denied.

ARGUMENT

I. THE REPORT APPLIES AN INCORRECT LEGAL STANDARD

A. The Test For Intervention In Original Actions Is Stringent

1. The New Jersey v. New York *Test Applies with Special Force in Equitable Apportionment Actions*

In *New Jersey v. New York*, this Court established a three-pronged test for intervention in original actions by any entity "whose state is already a party." 345 U.S. at 373. The entity must demonstrate (1) a "compelling interest in [its] own right," (2) "apart from [its] interest in a class with all other citizens and creatures of the state," (3) "which interest is not properly represented by the state." *Id.* The Court has consistently applied that test. *See Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995); *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam); *cf. Arizona v. California*, 460 U.S. 605, 615 n.5 (1983).

The Court has never permitted a non-sovereign water user to intervene in an action to apportion equitably an interstate river. *See* SC Br. 21-23 & n.13;

US Br. 10-12.[2] The Court permitted Indian Tribes to intervene in *Arizona v. California*, but did so based on their sovereign status. *See* 460 U.S. at 615; SC Br. 23; US Br. 15.

Because South Carolina seeks an "equitabl[e] apportion[ment]" of the Catawba River and an injunction preventing North Carolina from authorizing transfers from or uses of the river "in excess of [its] equitable apportionment as determined by this Court's decree." Compl., Prayer for Relief ¶¶ 1-2, the interests putative intervenors assert must be assessed against the relief South Carolina seeks. Charlotte, CRWSP, and North Carolina portray the Complaint as a narrow attack on particular interbasin transfer authorizations. But the Special Master found that South Carolina's Complaint "encompasses a general request for an equitable apportionment" and is "broader" than specific "interbasin transfers." CMO No. 8, at 1, 4.

The United States likewise understands that South Carolina "complains generally that the totality of uses in North Carolina . . . are causing the alleged shortages in South Carolina's putative share of the Catawba," with Charlotte's and CRWSP's particular transfers being "manifestations of the broader problem about which [South Carolina] is complaining." US Br. 20, 21 n.4; *see also* Duke Br. 1 ("Th[is] action seeks an equitable apportionment of the Catawba River."). Therefore, South Carolina seeks no relief against any of the proposed intervenors specifically.

[2] The Court did not review the Special Master's decision in *Nebraska v. Wyoming* to allow Basin Electric to convert from *amicus curiae* to intervenor status, because the case settled shortly afterwards. *See Nebraska v. Wyoming*, 534 U.S. 40 (2001). That decision is inapposite here. *See infra* pp. 6-7.

Indeed, under this Court's cases, equitable apportionment is a federal-law remedy that divides an interstate river's waters between *States*, not sub-units or citizens of those States. Whether any specific North Carolina user must reduce its water transfers or other water consumption will depend on North Carolina's post-apportionment, state-law decisions about the intrastate allocation of its equitable share.

Sound reasons support the Court's consistent practice of denying intervention by non-sovereigns in equitable apportionment cases. As the United States explains, "special sovereign interests . . . are at stake in equitable-apportionment actions." US Br. 7. A river's "prosperity affects the general welfare of the state." *Kansas v. Colorado*, 206 U.S. 46, 99 (1907). Disputes about apportioning rivers rise "above a mere question of local private right and involve[] a matter of state interest," *id.*, in which each State acts "as a quasi sovereign and representative of the interests and rights of her people," *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932); *see also Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (State "has the last word" in suits where it appears "in its capacity of quasi-sovereign"). Such disputes implicate "unique interests" of sovereign States. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284, 287 (1997) (noting that "waters uniquely implicate sovereign interests" and that the State holds title to public waters "in its sovereign capacity for the purpose of ensuring that it is used for the public benefit").[3] Indeed, North Carolina authorizes users

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[3] Duke mistakenly suggests (at 17) that the same concerns with respect to intervention apply in all original actions. But the Court has denied intervention in equitable apportionment

to extract water from the Catawba River without any accountability for the effects on South Carolina users.

Federal common law resolves such conflicts based on an "equality of right" between the States as sovereigns. *Kansas v. Colorado*, 206 U.S. at 97. Therefore, an equitable apportionment "is binding upon the citizens of each State and all water claimants," *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938), and the state-law rights of a "private appropriator" in either State "can rise no higher than those of" the party State. *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). Federal law thus determines "the *overall* share of water to be allocated to each State, and state law then determines how that share is to be allocated among individual water users within that State." US Br. 11. A water user's burden to justify intervention to defend its particular state-law allocation of water, therefore, should be exceedingly high.[4]

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actions because of the State's *parens patriae* role and to prevent the Court from being "drawn into an intramural dispute" over matters of state law. *New Jersey v. New York*, 345 U.S. at 373. Those concerns are of particular importance in an equitable apportionment action, in light of the unique sovereign interests implicated through relief that may be obtained only as between States.

[4] Moreover, because equitable apportionment is a zero-sum game — water reserved for an individual user in North Carolina is denied to all users in South Carolina — allowing individual claimants to intervene as defendants raises Eleventh Amendment issues because their claims are, in effect, directly against the down-stream State. *See* SC Br. 18 n.11; *see also* Duke Br. 17 (acknowledging existence of Eleventh Amendment concerns in original cases). North Carolina concedes (at 10 n.1) that the intervention analysis is "completely different" where "intervenors . . . seek[] to assert claims" against a State. But North Carolina ignores the zero-sum nature of equitable apportionment actions

The eventual intervention of Basin Electric in *Nebraska v. Wyoming* is not to the contrary. Basin Electric, Nebraska, and the United States — but not Wyoming, Basin Electric's home State — were parties to a court-approved settlement in 1978, which required Basin Electric to make certain releases of water from its Grayrocks Dam and Reservoir. *See* No. 108 16th Mem. 7. Relying on that settlement — and Nebraska's express citation of the operation of Grayrocks as a source of its injury — Basin Electric moved to intervene at the outset of the case. *See* No. 108 Basin Mot. 3-7. The Special Master denied that motion, finding Basin Electric "comparable to ... Philadelphia in *New Jersey v. New York*." No. 108 First Report 12 & n.23. The Special Master permitted Basin Electric to participate as an *amicus curiae* — a status with which Basin Electric remained "content[]" until 1998. No. 108 17th Mem. 8-10 (Duke Add. 9-11).

As the Special Master explained, changes in the scope of the case, the relief sought by Nebraska, and the positions of the party States left Basin Electric (a citizen of Wyoming) directly adverse to Wyoming with respect to the 1978 settlement. Specifically, the Court and the Special Master permitted Nebraska to amend her complaint to add a new count with respect to the Laramie River — which does not extend into Nebraska — seeking to enjoin Wyoming from interfering with water releases under the 1978 settlement.[5] Therefore, any decree "protect[ing] Basin's

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in claiming that putative intervenors assert no affirmative claim for relief.

[5] *See* No. 108 Third Interim Report 30, 44-47 & n.121; *see also Nebraska v. Wyoming*, 515 U.S. at 11-13 (rejecting exceptions to recommendation to permit Nebraska to add this count).

and Nebraska's rights" under that settlement would "likely take the form of an injunction against Wyoming." *Id.* at 12 (Duke Add. 13). Thus, Basin Electric's "status ha[d] become *sui generis* in the history of parties attempting to intervene in original jurisdiction cases." *Id.* at 12-13 (Duke Add. 13-14). The Special Master found that, at that later point in the litigation and because of the change in relief at issue, Basin Electric now had a compelling interest (in light of Nebraska's efforts to enjoin Wyoming from interfering with the court-approved settlement) that Wyoming — which was not a party to the settlement — did not adequately represent. *Nebraska v. Wyoming*, therefore, does not support intervention here.

2. A Party State's Citizen Bears a Heavy Burden of Demonstrating Inadequate Representation

Although a potential intervenor must satisfy all three *New Jersey v. New York* factors, the Court has placed particular weight on the adequacy-of-representation prong. In *New Jersey v. New York*, Philadelphia claimed that it "cannot rely for an adequate presentation of its interest upon Pennsylvania," as it was "without any guide as to what [Pennsylvania's] policy on the Delaware now is or later may be." No. 5 Phil. Mem. 6. The Court denied Philadelphia's motion, finding that the claimed inadequacy was not a "concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests," which were "invariably served by the Commonwealth's position." 345 U.S. at 374.

Similarly, the Court explained in *Nebraska v. Wyoming* and *United States v. Nevada* that "individual users of water" would have "no right to intervene in an original action," because they are "unlikely" to

be able to show that their "interests are not adequately represented by their State."[6] In permitting Indian Tribes to intervene in *Arizona v. California*, the Court expressly distinguished *New Jersey v. New York*, noting that, unlike the sovereign Tribes — which are "independent . . . members of the modern body politic" — Philadelphia was required to show that its "interests were [not] adequately represented by [its] State." 460 U.S. at 615 & n.5 (internal quotation marks omitted).

The Court's insistence that an entity "whose state is already a party" show a "compelling interest" that "is not properly represented by the state" is based on the "*parens patriae* doctrine" and reflects "the principle that the state, when a party to a suit involving a matter of sovereign interest, *must* be deemed to represent all its citizens." *New Jersey v. New York*, 345 U.S. at 372-73 (internal quotation marks omitted; emphasis added). The "appearance . . . of a state" before this Court in an original action, "either as complainant or defendant, is conclusive," because the various citizens of the party States "have no separate individual right to contest in such a suit the position taken by the state itself." *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930). Otherwise, "a state might be judicially impeached on matters of policy by its own subjects," and the Court, in the exercise of its original jurisdiction, would be "drawn into an intramural dispute" over matters of state law between a State and its citizens. *New Jersey v. New York*, 345 U.S. at 373.

The Court's rule is both a "necessary recognition of sovereign dignity" and "a working rule for good judicial administration" in original actions. *Id.* There-

[6] *United States v. Nevada*, 412 U.S. at 538; *Nebraska v. Wyoming*, 515 U.S. at 22.

fore, North Carolina's belated support for intervention[7] — and its professed lack of concern that it might be "judicially impeached by Charlotte's positions" — is irrelevant. NC Br. 23; *see* Charlotte Br. 24-26. North Carolina is not free to shirk its obligation in "dividing the waters of an interstate stream with another State" to represent all of the "users in its own State insofar as the share allocated to the other State is concerned." *United States v. Nevada*, 412 U.S. at 539. Charlotte, for example, concedes that its aim in intervening is for this Court to resolve an "intramural dispute" between upstream and downstream users *within* North Carolina. *New Jersey v. New York*, 345 U.S. at 373; *see* Charlotte Br. 16, 34.[8] That is something the Court has never done and should not do here, lest its "original jurisdiction" be "expanded to the dimensions of ordinary class actions." 345 U.S. at 373.

Drawing on cases under Rule 24(a)(2), Charlotte claims that it bears only the "minimal burden" of showing that its State "may be" an inadequate representative. Charlotte Br. 30 n.8 (internal quotation

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[7] North Carolina "deliberately . . . did not take positions with respect to these [motions]" before the Special Master. Mar. 28, 2008 Hearing Tr. 76:11-13. North Carolina did not "consent[]" to any of the motions, as it now claims. NC Br. 5.

[8] South Carolina is not defending "North Carolina's sovereign prerogatives," which Charlotte claims South Carolina "lacks standing" to do. Charlotte Br. 26-27. Instead, South Carolina relies on the unique relief that this Court's jurisprudence provides to apportion equitably the waters of an interstate river between concerned *States*, not between a State and the political subdivisions of another State. This Court's historical practice is to "exercise [its] original jurisdiction sparingly," regardless of whether a State or the United States is amenable to expansion of that jurisdiction. *United States v. Nevada*, 412 U.S. at 538.

marks omitted).[9] The Federal Rules of Civil Procedure, however, are only "guides" in original actions. Sup. Ct. R. 17.2. Moreover, this Court has expressly recognized that water users that would "have an opportunity to participate in their own behalf [in] litigation . . . in [a] District Court" under Rule 24 — despite their State being a party to the litigation — "would have no right to intervene in an original action in this Court." *United States v. Nevada*, 412 U.S. at 538; *see Environmental Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 739-40 & n.5 (D.C. Cir. 1979) (per curiam) (holding that the "more stringent" *New Jersey v. New York* "test for intervention" "has full vitality for [original] actions," "but not for suits in federal district court").

Even under Rule 24(a)(2), a potential intervenor whose State is already a party "must overcome th[e] presumption of adequate representation," by showing "that its interest is in fact different from that of the state and that that interest will not be represented by the state." *Id.* at 740; *see United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985-87 (2d Cir. 1984) (Friendly, J.) (court should not lightly "permit[] intervenors to disrupt the government's exclusive control over the course of its litigation").

Charlotte instead cites administrative review cases in which courts have found inadequate representa-

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[9] Charlotte also suggests (at 34-35) that the Rule 24(b) permissive intervention standard applies, based on the Court's brief reference in *Arizona v. California* to the Indian Tribes "satisfy[ing]" that standard. 460 U.S. at 614-15. But the Court did not alter the *New Jersey v. New York* test, which does not permit intervention in original actions on so lax a standard. Instead, *Arizona v. California* relied on the Tribes' status as sovereigns, expressly distinguishing *New Jersey v. New York* on that ground. *See id.* at 615 & n.5.

tion after comparing the government's obligation to "represent the broad public interest" to the parochial interest of the proposed intervenor. *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994); *see* Charlotte Br. 30 n.8. But that is not the rule in original actions, where States act in their sovereign, rather than their regulatory, capacity. This Court found "no merit" in the contention that the federal government's obligation to "represent[] varied interests in litigation" meant that "the United States' representation" of the Indian Tribes' interests, prior to their intervention, "was inadequate." *Arizona v. California*, 460 U.S. at 627; *see also Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996) (Posner, C.J.) ("[m]ore is needed than" reliance "on the diversity of the Department[] [of Justice's] interests," otherwise "in no case ... could intervention be refused").[10]

3. Any Legitimate Interests of Putative Intervenors Can Be Accommodated Through Other Means

North Carolina contends (at 10) that, absent intervention, the Special Master "would [be] preclude[d] ... from hearing from" Charlotte, CRWSP, and Duke. North Carolina fails to note its own responsibility to speak on behalf of its political subdivisions Charlotte and Union County (part of CRWSP). It is a "settled doctrine[] of this [C]ourt" that "[m]unicipal

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[10] Charlotte gains no support (*see* Br. 30-33) from cases in which *States* were permitted to intervene. Those cases rest on the inarguable proposition that States are not required to let private parties or the federal government (acting through an agency as a regulator) represent their sovereign and *parens patriae* interests.

corporations" and other "political subdivisions of the state" are "created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

The Special Master in *Virginia v. Maryland* thus denied the unopposed motion of Loudoun County and its Sanitation District to participate even as *amici curiae*, reasoning that, as "political subdivisions of a party State, the Commonwealth of Virginia, and the Attorney General of Virginia represents their interests." No. 129 Mem. of Decision No. 1, at 3. The Special Master held further that, even if their interests "diverge from" the interests of others in Virginia, those interests raised only "conflicts internal to Virginia" that should be addressed "through coordination and cooperation" with the Virginia Attorney General. *Id.* at 3-4. Virginia "must speak with one voice in this litigation." *Id.* at 4.

In addition, as Judge Friendly explained, intervenors obtain "the right to have discovery and to make motions" and "the right to appeal." *Hooker Chems.*, 749 F.2d at 992. It plainly would distort the central constitutional purpose of original actions between two States to give such rights to citizens and political subdivisions of States. The Special Master here made no mention of the possibility of North Carolina's political subdivisions expressing their views through the State's Attorney General or of *amicus* participation at appropriate junctures in the litigation when putative intervenors' issues are most directly implicated. No intervenor explains why it should be permitted to use compulsory process to obtain information from a State or to file motions that could alter the scope and course of litigation between two sovereigns.

CRWSP and Duke assert only an interest in presenting evidence. *See* CRWSP Br. 28; Duke Br. 36. An *amicus*, however, "may selectively be permitted to introduce evidence . . . to develop certain issues." No. 108 Third Interim Report 20. Any such interest here can be accommodated without according the additional right of intervenors to compel production of information from the party States.[11] It would also be inappropriate for non-state entities to have the power to object to, interfere with, or except from a settlement to which the two party States agree. To the extent their views will benefit the Court, they can be expressed as *amici* without the panoply of party rights that an intervenor possesses.[12]

B. The Report's Novel Approach Is Inconsistent With This Court's Precedent

The Report did not apply the Court's *New Jersey v. New York* test, *see* SC Br. 25-32; US Br. 15-19, and none of the putative intervenors defends the new legal standard the Report "distilled." Report at 20. North Carolina and Charlotte ignore the Report's standard altogether; CRWSP relegates it to a footnote. *See* CRWSP Br. 36 n.3. Only Duke attempts a

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[11] South Carolina's issuance of discovery to CRWSP and Duke does not support intervention. They are only two among the many third parties that possess information potentially relevant to an equitable apportionment. (South Carolina has already served third-party subpoenas on five entities.)

[12] An intervenor, however, "does not have power to block [a settlement] merely by withholding its consent." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986); *see* US Br. 22; *see also Nebraska v. Wyoming*, 515 U.S. at 22 (equitable apportionment actions can be resolved "without the participation of individual claimants").

defense, but must distort the Report to do so. *See* Duke Br. 14-17.

1. The Report's Approach Nullifies the Court's Adequate-Representation Requirement

The Report placed no weight on the requirement that an "intervenor whose state is already a party" demonstrate concretely that its interest "is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373. North Carolina and Charlotte expressly acknowledge as much. *See* NC Br. 22; Charlotte Br. 16. CRWSP and Duke, in contrast, pretend that the Report found that the State parties would not adequately represent their interests. *See* CRWSP Br. 24-25; Duke Br. 11. Tellingly, neither cites any portion of the Report making such a finding. In fact, there is none. *See* Report at 21-32.

When South Carolina pointed out this failure to require a showing of inadequate representation, the Special Master acknowledged that South Carolina's argument "draws upon the test for intervention articulated in *New Jersey v. New York*." *Id.* at 39. But the Report sidesteps that argument with the erroneous view that the Court intends to permit a non-state entity with "concrete interests" that are "directly at stake" to "speak for itself," without regard to whether that entity's interests are "aligned with those of the defendant state or states." *Id.* at 39-40 (internal quotation marks omitted).[13]

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[13] The Report errs in suggesting that, in *Texas v. Louisiana* and *Maryland v. Louisiana*, the Court permitted intervention where the party State adequately represented the intervenors' interests. In fact, Texas could not adequately defend Port Arthur, which asserted a property right in a discrete piece of land against both the United States and Texas. *See* SC Br. 32-33. In *Maryland v. Louisiana*, the pipelines' home States were

Duke, however, contends that the Report gave proper weight to the adequacy-of-representation factor, relying on the Report's assertion that the "Court does *not* require a 'conflict of interest or some other disabling factor that would prevent the party state from representing the proposed intervenor's interests.'" Duke Br. 15 (quoting Report at 23). But Duke cannot point to any finding in the Report that its interests — or those of Charlotte or CRWSP — are "not properly represented by" the party States. *New Jersey v. New York*, 345 U.S. at 373.

Instead, Duke claims that the Report's distillation of "compelling specific interests" *implicitly* identified those circumstances where the party State does "not . . . adequately represent[]" its citizens, despite the absence of any "directly conflicting interest" between the State and its citizen. Duke Br. 15-16. The Report, however, characterizes those circumstances as ones where the State parties "likely . . . would protect the non-state entity's interest" or where that entity was "clearly . . . aligned with . . . the defendant state." Report at 40.

In all events, the Report and Duke misread this Court's precedents. "[A] conflict of interest or some other disabling factor" (Report at 23) *is* required, particularly in an equitable apportionment case. In *Arizona v. California*, after permitting Indian Tribes to intervene based on their sovereign status, the Court addressed the Tribes' claim that they were entitled to revisit matters decided while they were

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not parties to the case, and the Special Master there found the pipelines and State plaintiffs to have different interests. *See id.* at 34-35. Duke and CRWSP repeat the Report's errors without addressing those points. *See* Duke Br. 16 n.3, 18 n.4, 19 & n.5; CRWSP Br. 31-36.

not parties to the case because "the United States' representation" of their interests had been "inadequate." 460 U.S. at 627. The Court rejected that contention because the Tribes had made no showing that the United States "was involved in an actual conflict of interest." *Id.* Similarly, in *Nebraska v. Wyoming*, the Special Master found that the party States adequately represented Basin Electric until the case evolved to the point where Basin Electric would likely have to seek "an injunction against [its home state] Wyoming" to protect its interests. No. 108 17th Mem. 12 (Duke Add. 13). As the Special Master there concluded, "Wyoming [could] hardly be put in the position of presenting evidence to support an injunction against itself." *Id.*

2. The Report's "Instrumentality" Test Has No Basis in This Court's Precedent

Relying exclusively on cases where plaintiff States named both other States and non-state entities as defendants, the Report concludes that non-state entities should be permitted to intervene "in water disputes" if they are "accused of being the agent of injury" or the "instrumentality authorized to carry out the wrongful conduct." Report at 14, 21. Those cases reflect no determination by this Court that the non-state entities, if not named as defendants, could properly have intervened. *See* SC Br. 28-31; US Br. 17-19. Instead, they reflect a brief period of uncertainty in this Court's cases, which ended in 1932, when it was unclear whether an equitable apportionment decree binds the citizens of party States. *See* SC Br. 28-29 & n.17.[11]

[11] Duke asserts (at 20) that the Report relied on those cases to "demonstrate that there is no constitutional barrier to third-

Moreover, the Report's "agent of injury" test eviscerates the *parens patriae* principle that a State must be deemed to represent all of its citizens; in virtually all cases one State will injure another State through its agents or instrumentalities, all of which (under the Report's approach) would be permitted to intervene. *See* SC Br. 31-32. Lacking any limiting principle, the Report's test subjects a State to the enormous additional costs, burdens, and delay of litigating against the putative "agents" of another State, when the defendant State can provide the complete relief the plaintiff State seeks.

The decisions of the *Nebraska v. Wyoming* Special Master on Basin Electric's intervention motions likewise undermine the "agent of injury" theory. Basin Electric initially sought to intervene on the ground that Nebraska's complaint identified Basin Electric's operation of the Grayrocks Dam and Reservoir as a source of its injury. *See* No. 108 Basin Mot. 3-7. But the Special Master *denied* that motion, finding Basin Electric to be no different from the City of Philadelphia. *See* SC Br. 22-23. Only after Nebraska later sought relief that caused Basin Electric to be directly adverse to its home State of Wyoming did the Special Master perceive a "*sui generis*" situation and grant intervention. No. 108 17th Mem. 12-13 (Duke Add. 13-14).

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party participation in [equitable apportionment] cases." South Carolina never claimed that the Constitution prohibits a State from naming a non-state entity as a defendant. In addition, the Report cites (at 14-15) those joinder cases to justify its "agent of injury" theory; they are the *only* cases cited for that theory.

II. EACH INTERVENOR FAILS THE COURT'S STRICT STANDARD

A. Charlotte Is Not Entitled To Intervene

1. Charlotte Cannot Demonstrate Any Interest Not Adequately Represented by North Carolina

Charlotte's sole asserted interest is in its IBT permit. *See, e.g.*, Charlotte Br. 1, 17. Although Charlotte claims that North Carolina will not fully represent Charlotte's interest, North Carolina has disputed Charlotte's claim from the outset and continues to "disagree[] with this assertion by Charlotte." NC Br. 22; *see* SC Br. 39. Like Philadelphia, Charlotte points to no "concrete consideration" as to which its position diverges from North Carolina's. *New Jersey v. New York*, 345 U.S. at 374.

Charlotte, however, claims that it can "make [a] showing of inadequacy of representation" by pointing to the fact that "North Carolina must represent the interests of all water users . . . . including municipal users upstream of Charlotte," while Charlotte's interest "is exclusively that of a downstream water user." Charlotte Br. 16, 33. Consequently, Charlotte maintains, North Carolina "may not adequately represent . . . Charlotte's narrower interest." *Id.* at 31.

Such an "intramural dispute over the distribution of water *within* the [State]," however, has no place in an interstate equitable apportionment action. *New Jersey v. New York*, 345 U.S. at 373 (emphasis added). Charlotte's requested preferential treatment vis-à-vis upstream North Carolina water users is insufficient to justify its intervention here, and also fails the *New Jersey* requirements that the intervenor's interests be both "compelling" and "apart from his interest in a class with all other citizens and creatures of the state." *Id.*; *see* US Br. 20 ("The

proposed intervenors may well have a stake in the ensuing 'intramural dispute,' but their interests in the apportionment are represented by their States.").[15]

2. Charlotte's Interest Is Neither Compelling Nor Apart from Other Water Users

Although South Carolina's Complaint mentions several interbasin transfers, the suit is directed at all North Carolina uses, including in-basin withdrawals. The IBTs dramatically illustrate that North Carolina authorizes extremely large uses of the Catawba River without sufficiently considering their effects in South Carolina. Charlotte's IBT is among dozens of withdrawals that may or may not be affected by North Carolina's *intra*state apportionment of its equitable share. *See* SC Br. 41-44; US Br. 21 n.4. As the United States notes, "[a]ll water users in North Carolina have interests that are potentially affected by the relief sought against their sovereign." US Br. 20-21. If Charlotte's existing water use were sufficient to satisfy the first two prongs of the *New Jersey v. New York* test, "wide-scale intervention by individual water users" would follow. *Id.* at 21.

Nevertheless, Charlotte advances its status as the largest municipal user of water in North Carolina as a basis for intervention, as well as its IBT representing the "lion's share" of IBTs in North Carolina. Charlotte Br. 18; *see also id.* at 3 (claiming responsibility for "53 percent of all municipal usage of the water resources of the Catawba River basin"). In

[15] Charlotte claims it will offer unique defenses. But adequate representation turns on whether, as *parens patriae*, North Carolina represents Charlotte's *interests*, not whether it will pursue the same litigation strategy.

New Jersey v. New York, however, the Court denied intervention to Philadelphia despite its representation of more than 50 percent of the water users in the affected watershed. *See* 345 U.S. at 373 n.*; US Br. 21 n.4. That clear holding resolves the same question here.

B. CRWSP's Motion Fails For Substantially Similar Reasons As Charlotte's

CRWSP's motion is "similar analytically to Charlotte's," Report at 25, as both have IBT authorizations from North Carolina. For the same reasons as Charlotte, CRWSP may not intervene. *See* SC Br. 45-46.

CRWSP, however, claims its interests will not be adequately represented because it is a "bi-state" entity, composed of a political subdivision in each party State. Br. 19. But any interests CRWSP's component parts have are represented by their home States. As the Special Master correctly found, "municipalities cannot combine to form a sovereign. Rather, municipalities are creatures of state law, and any rights they enjoy 'can rise no higher than those of [the party state.]' *Nebraska* v. *Wyoming*, 295 U.S. 40, 43 (1935)." Report at 27.[16]

1. North Carolina adequately represents CRWSP's interests with respect to withdrawals to benefit its North Carolina component, Union County, and which form the basis of its motion for intervention. *See* CRWSP Br. 8, 19-20. North Carolina seeks to preserve the maximum apportionment to which it is

[16] Contrary to CRWSP's suggestion (at 24), the Report gives no weight to its bi-state status. It recommends intervention by CRWSP "[f]or the same reasons as with Charlotte," Report at 27, which is a political subdivision of a single party State.

entitled. *See* NC Charlotte Resp. 1-2 (explaining that North Carolina "must represent the interests of *every* person that uses water from the North Carolina portion of the Catawba River basin" and "has every reason to defend the IBTs that it has authorized for the benefit of its citizens") (emphasis added). North Carolina affirms here that it "opposes" relief limiting "IBTs in North Carolina." NC Br. 21.

That Union County's water is withdrawn by CRWSP in South Carolina and piped north does not alter North Carolina's adequate representation of CRWSP's proffered interests: Union County's water use comes from North Carolina's equitable share. *See* CRWSP Br. 22-23; NC Br. 21. CRWSP's apparent fear that North Carolina might reallocate CRWSP's intrastate share cannot be raised here, but rather "will depend on how state-law water rights and uses are allocated." US Br. 20.

2. Nor can CRWSP manufacture a compelling case for intervention based on the interests of its *South Carolina* component. *See* CRWSP Br. 20-21. CRWSP has grounded its intervention solely on Union County's water uses. In any event, South Carolina, like North Carolina, seeks to maximize its equitable share, and thus adequately represents the South Carolina water users supplied by CRWSP. Any dispute among South Carolina users is likewise an intramural dispute under state law and not suitable for resolution in this case.

3. Finally, CRWSP (at 16-18) claims intervention is proper because the Court, in two equitable apportionment decrees, has set out particular priorities of use in each State. The Court did so, however, on the basis that those States followed the doctrine of prior appropriation prevalent in arid, western States,

"whereby priority of appropriation gives superiority of right." *Wyoming v. Colorado*, 298 U.S. 573, 576 (1936); *accord Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945). North Carolina and South Carolina, in contrast, follow the "reasonable use" doctrine of riparian rights that does not rest on the principle of first in time, first in right.[17] The Court would be less likely here to specify particular prior appropriations in each State. *See New Jersey v. New York*, 283 U.S. 336, 346-47 (1931) (establishing permissible total state diversion, which "shall not constitute a prior appropriation").

In any event, the Court made clear that a decree identifying specific uses within a State nevertheless leaves those uses subject to state law. In *Wyoming v. Colorado*, the Court held that exceeding a decreed individual appropriation is no violation, "so long as the total diversions under all do not exceed the aggregate of the quantities accredited to them severally." 298 U.S. at 583; *see id.* at 584 (decree did not "withdraw water claims dealt with therein from the operation of local laws relating to their transfer").

Basing intervention on the possibility that the Court will weigh the costs and benefits of particular water uses would permit intervention by all water users seeking to have their use valued as high as possible by their home State. Such disputes over the relative values of individual uses in North Carolina raise state-law questions for North Carolina to resolve.

[17] *See, e.g., Lowe v. Ottaray Mills*, 77 S.E. 135, 136 (S.C. 1913); *Smith v. Town of Morganton*, 123 S.E. 88, 89 (N.C. 1924).

C. Duke Is Not Entitled To Intervene

1. Duke's Interests Are Adequately Represented

Duke claims two types of interests: (a) its operation of its hydropower system in accordance with the CRA and the terms of its FERC licenses; and (b) its rights under North Carolina law as an impounder of water. As to the first, the party States adequately represent any interest Duke has that is implicated in this proceeding. As to the second, North Carolina adequately represents Duke's interest.

a. South Carolina seeks an apportionment that should have the effect, in low-flow periods, of restricting the total amount of water North Carolina users may withdraw from the Catawba River, thus providing more water to flow into Duke's reservoirs and across the state boundary. North Carolina's IBTs in particular reduce that flow because that water does not return to the Catawba River Basin. Duke does not (and cannot) deny that, the more water available in the river system, the less likely it is that low-flow periods will occur. Duke will have more water upstream to release for power generation, and South Carolina will have more water to meet its legitimate needs. *See* SC Br. 50-51.

Vindicating South Carolina's interests will facilitate Duke's efforts to meet the minimum flow requirements set out in the CRA's Low Inflow Protocol ("LIP"), assuming FERC ultimately adopts it. A ruling for South Carolina that increases the amount of water available downstream will result in fewer and shorter invocations of the LIP's Stage 3, which has been invoked far more often in less than two

years than anticipated in Duke's modeling for the entire 50-year relicensing period. *See id.*[18]

Duke responds (at 27, 31) that lowered North Carolina consumption from an equitable apportionment is not the only possible outcome here. But that is simply a claim that South Carolina might not prevail, not a showing of inadequate representation.

Duke unpersuasively claims (at 27-28, 31) that each State's interest "to maximize" its apportionment might conceivably affect its ability to implement the LIP and unravel the CRA. North Carolina shares Duke's interest in keeping major water intakes sufficiently covered during times of low flow to protect the operations of municipal and industrial water users. Indeed, North Carolina has championed the CRA in defending against South Carolina's claims. *See* SC Br. 47-48. South Carolina likewise will seek to protect its public water supply and industry in amounts that might exceed CRA requirements.[19] An appor-

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[18] Stage 3 is the second-most serious LIP stage; Stage 4 is an emergency condition in which "Remaining Usable Storage" "can be fully depleted in a matter of weeks or months." NC App. 88a. Duke's modeling predicted Stage 3 would occur in only four months of the coming 50-year license term (Duke says six months, Br. 30 n.7, but it appears to be relying on rounding), yet over the last two years Stage 3 was in effect for 15 months, which as Duke concedes far outstrips the model's projections. *See* SC Br. 5.

[19] South Carolina is necessarily harmed whenever the LIP is triggered. This Court has consistently found that a downstream State meets its initial burden to show harm when the "inflow is not adequate to meet all of the normal demands for water." NC App. 66a; *see Wyoming v. Colorado*, 259 U.S. 419, 476 (1922) (decree based on dependable flows); *Nebraska v. Wyoming*, 325 U.S. at 608, 610 (same; finding that claims that "the water of a river [during low-flow periods] exceed the supply"

tionment that takes account of North Carolina's IBTs will make more water available to Duke and to South Carolina.

In addition, although the CRA requires various third parties to undertake conservation measures when the LIP is triggered, FERC apparently cannot enforce those obligations. *See* NC App. 72a-74a, 78a-80a, 83a-86a, 90a-91a.[20] Duke does not claim that either State will undermine those conservation measures. And because an equitable apportionment decree could functionally require North Carolina to take actions that enhance the efficacy of CRA measures, this action tends to strengthen, not unravel, the CRA.

Finally, the issues before FERC are within the exclusive jurisdiction of the court of appeals to review in the first instance. *See* 16 U.S.C. § 825*l*(b). Any federal interests are for the United States to represent, and the United States opposes Duke's intervention to protect its own private interests or federal public interests. As the United States explains, this Court and the Special Master can take account of the terms of any FERC license. Duke's participation as an *amicus* will be sufficient to provide Duke's views on any arguable tensions between a possible decree

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demonstrate that "a controversy exists appropriate for judicial determination").

[20] *See* Policy Statement on Hydropower Licensing Settlements, *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 116 FERC ¶ 61270, 2006 WL 2709607, ¶ 6 (Sept. 26, 2006) ("[FERC] has jurisdiction only over its licensees, and therefore cannot enforce any condition . . . on a non-licensee.").

and its FERC license, should they arise. US Br. 20 n.3.[21]

b. Despite insisting that it "does not seek to intervene to protect or increase its share of water," Duke Br. 13, Duke repeatedly relies on its state-law rights "as an impounder of water [having] 'a right of withdrawal of excess volume of water attributable to the impoundment,'" *id.* at 26 (quoting N.C. Gen. Stat. Ann. § 143-215.44(a)); *see also* Duke Br. 2, 13, 19, 21, 34-36. North Carolina, however, represents those state-law rights and should be the one to establish their priority under state law.

2. Duke's Interests Are Neither Compelling Nor Unique

a. Duke's interests in the CRA and its FERC license derive from its status as a large water user on the Catawba River. Such interests cannot be compelling or unique, or every dam operator and impounder on every river would be entitled to intervene. And, because the availability of extra water would make Duke's compliance with the CRA easier, its interest as a water user cannot be "compelling."

South Carolina's claims focus on inequitable water consumption in North Carolina, which affects the amount of water left in the reservoir system that can flow into South Carolina. Those South Carolina interests do not even implicate the CRA. As Duke concedes, "the CRA does *not* purport to 'control any of the disputed water consumption in North Carolina.'" Duke Br. 29 (quoting SC Br. 51) (emphasis added).

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[21] Duke correctly states (at 2) that the party States (unlike certain state agencies) have not signed the CRA, but that has no impact on the States' ability to represent Duke's legitimate interests.

Indeed, the CRA expressly provides that it has *no* effect on state water rights, Duke's own relicensing application says the same thing, and FERC consistently makes its licenses subject to this Court's equitable apportionment judgment. *See* SC Br. 51-52. Accordingly, Duke's interest in the LIP that will be supported by South Carolina's position cannot be compelling.

Reinforcing those points is FERC staff's March 6, 2009 Draft Environmental Impact Statement for Hydropower License ("Draft EIS"), which recommends granting Duke's relicensing application with certain changes.[22] The Draft EIS confirms that "[p]ublic water supply, inter-basin transfers, wastewater, and industrial discharges are regulated by the states" and that "inter-basin transfers ... are not within the scope of this licensing process." Draft EIS at 122.[23]

The CRA, the Draft EIS, and FERC's practice of making its licensing orders subject to equitable apportionment decisions by this Court (*see* SC Br. 51) all make clear that the proper level of consumption in North Carolina for equitable apportionment purposes will not upset the CRA and is not a matter to be decided in the FERC proceeding, but rather for this Court's assessment of the proper interstate equitable apportionment.

b. Duke's state-law rights "as an impounder of water" in North Carolina are likewise neither com-

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[22] FERC, Hydropower – Environmental Impact Statements (EISs), *at* http://www.ferc.gov/industries/hydropower/enviro/eis/2009/03-06-09.asp.

[23] Duke's claim (at 2) that "the CRA reflects an equitable apportionment of the Catawba River" is therefore false.

pelling nor unique. Duke Br. 26. As Duke conceded before the Special Master, its water user interests are *not* compelling. *See* SC Br. 49 n.36; US Br. 20 n.3. Any rights Duke has under North Carolina water use law are for North Carolina to represent as *parens patriae*, and not for Duke to assert here.

CONCLUSION

The Exceptions of the State of South Carolina to the First Interim Report of the Special Master should be sustained, and the motions for leave to intervene of Charlotte, CRWSP, and Duke should be denied.

Respectfully submitted,

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